DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 10-9995
Title: Patrick Wood, Petitioner
v.
Kevin Milyard, Warden, et al.
Docketed: April 13, 2011
Lower Ct: United States Court of Appeals for the Tenth Circuit
Case Nos.: (09-1348)
Decision Date: November 26, 2010
Rehearing Denied: January 7, 2011

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Apr 7 2011	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due May 13, 2011)
Apr 14 2011	Waiver of right of respondents Kevin Milyard, Warden, et al. to respond filed.
Apr 27 2011	DISTRIBUTED for Conference of May 12, 2011.
May 9 2011	Response Requested . (Due June 8, 2011)
Jun 8 2011	Order extending time to file response to petition to and including July 8, 2011.
Jul 6 2011	Brief of respondents Kevin Milyard, Warden, et al. in opposition filed.
Jul 28 2011	DISTRIBUTED for Conference of September 26, 2011.
Sep 27 2011	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED limited to the following questions: 1) Does an appellate court have the authority to raise sua sponte a 28 U.S.C. 2244(d) statute of limitations defense? 2) Does the State s declaration before the district court that it will not challenge, but [is] not conceding, the timeliness of Wood s habeas petition, amount to a deliberate waiver of any statute of limitations defense the State may have had?
Nov 4 2011	The time to file the joint appendix and petitioner's brief on the merits is extended to and including December 2, 2011.
Nov 4 2011	The time to file respondent's brief on the merits is extended to and including January 20, 2012.
Nov 4 2011	The petitioner will file a reply brief on or before February 13, 2012.
Dec 2 2011	The time to file the joint appendix and petitioner's brief on the merits is further extended to and including December 5, 2011.
Dec 5 2011	Joint appendix filed. (Statement of costs filed)
Dec 5 2011	Brief of petitioner Patrick Wood filed.
Dec 19 2011	SET FOR ARGUMENT ON Monday, February 27, 2012.
Jan 3 2012	CIRCULATED.

Jan 3 2012	Record received from U.S.C.A. for 10th Circuit. (1 envelope)
Jan 3 2012	Record from U.S.D.C. for District of Colorado is electronic.
Jan 19 2012	The time to file respondent's brief on the merits is further extended to and including January 23, 2012.
Jan 23 2012	Brief of respondents Kevin Milyard, Warden, et al. filed. (Distributed)
Jan 30 2012	Brief amicus curiae of the United States filed. (Distributed)
Jan 30 2012	Brief amici curiae of Texas, et al. filed. (Distributed)
Jan 30 2012	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Feb 8 2012	The petitioner will file a reply brief on or before 2 p.m., February 17, 2012.
Feb 17 2012	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Feb 17 2012	Reply of petitioner Patrick Wood filed. (Distributed)
Feb 27 2012	Argued. For petitioner: Kathleen A. Lord, Assistant Federal Public Defender, Denver, Col. For respondents: Daniel D. Domenico, Solicitor General, Denver, Col.; and Melissa Arbus Sherry, Assitant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.)
Apr 24 2012	Judgment REVERSED and case REMANDED. Ginsburg, J. delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Breyer, Alito, Sotomayor, and Kagan, JJ., joined. Thomas, J., filed an opinion concurring in the judgment, in which Scalia, J., joined.
May 29 2012	JUDGMENT ISSUED.
May 31 2012	Record returned to U.S.C.A. for Tenth Circuit.

PETITION
FOR
WRIT OF
CERTIORARI

NO. ____

IN THE

SUPREME COURT OF THE UNITED STATES

PATRICK WOOD, *Petitioner*,

v.

KEVIN MILYARD, Warden, Sterling Correctional Facility, *Respondent*.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Given the plain directive in *Day v. McDonough*, 547 U.S. 198 (2006), that "[this Court] would count it an abuse of discretion to override a State's deliberate waiver of a limitations defense," and the general rule that an affirmative defense is forfeited when not asserted, did the circuit court reversibly err when it *sua sponte* raised a statutory limitations defense for the first time on appeal, even though the government had repeatedly represented in the district court that it was "not challenging" the timeliness of Mr. Wood's 28 U.S.C. § 2254 petition and the district court ruled on the merits of petitioner's claims?

II. Do the principles set forth by this Court in its unanimous decision in *Kontrick v. Ryan*, 540 U.S. 443 (2004) and it *per curium* decision in *Eberhart v. United States*, 546 U.S. 12 (2006), which hold that statutory limitations defenses are forfeited if not raised before the district court rules on the merits of the claim, apply with equal force to habeas proceedings?

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IN THE SUPREME COURT OF THE UNITED STATES

Patrick Wood, *Petitioner*,

v.

KEVIN MILYARD, Warden, Sterling Correctional Facility, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OPINION BELOW

The United States Court of Appeals for the Tenth Circuit affirmed the district court's order denying Mr. Wood's 28 U.S.C. § 2254 petition for writ of habeas corpus in an order and judgment dated November 26, 2010. This opinion is attached as Appendix A to this petition.

STATEMENT OF JURISDICTION

As permitted by the circuit court, Mr. Wood filed a petition for rehearing on January 3, 2011, which the court denied on January 7, 2011. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291. As required by Supreme Court Rule 13, this petition has been filed within ninety days of the order denying rehearing, and this Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

28 U.S.C. Section 2244(d)(2)

> The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this section.

Rules Governing Section 2254 Cases in the United States District Courts

> **Rule 12**: The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules.

Federal Rules of Civil Procedure

FRCP Rule 8(c). General Rules of Pleading ...

(c) Affirmative Defenses.

(1) *In General.* In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including: ....

- laches;
- statute of limitations; and
- waiver.

FRCP Rule 12(b). Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing ....

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;
(2) lack of personal jurisdiction;
(3) improper venue;
(4) insufficient process;
(5) insufficient service of process;
(6) failure to state a claim upon which relief can be granted; and
(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

FRCP Rule 15. Amended and Supplemental Pleadings

(a) Amendments Before Trial.
  (1) *Amending as a Matter of Course.* A party may amend its pleading once as a matter of course within:
    (A) 21 days after serving it, or
    (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.
  (2) *Other Amendments.* In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

STATEMENT OF THE CASE AND FACTS[1]

Patrick Wood filed a petition for writ of habeas corpus in the United States District Court for the District of Colorado, challenging his state conviction for first degree murder (Doc.1, p5). Mr. Wood raised five constitutional claims, three of which were ultimately dismissed for non-exhaustion and two of which, involving constitutional claims that Mr. Wood's right to trial by jury had been violated and that his two convictions for murder of a single person violated double jeopardy, were ruled on by the district court on the merits. *See* App. B.

The district court denied Mr. Wood a certificate of appealability ("COA"), but the Tenth Circuit granted him one. *See* App. D. The circuit court appointed counsel for Mr. Wood, authorized the appeal of two substantive claims, but also ordered the parties to brief the timeliness of Mr. Wood's § 2254 petition and any state procedural rules that might bar consideration of Mr. Wood's claims. *See* App. C at 18. Timeliness had not been challenged by the government in the district court (Doc.15,p3-4; Doc.22,p4-6). Specifically, the state asserted "Respondents are not challenging, but do not concede, the timeliness of the petition." (Doc.15,p4; Doc.22p4).

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[1] The record on appeal consists of one volume of federal district court pleadings and orders, and the state court record consisting of one pleadings volume and a compact disc containing volumes 2-7, which are transcripts of pre-trial and trial proceedings. Counsel for Mr. Wood will cite to the federal court record on appeal by Document number and page number of the record (*e.g.*, Doc.1,p5); counsel will cite to the state court proceedings by volume and page number of the proceedings (*e.g.*, v1p8). Citations to matters contained in Appendices to this petition with be to the Appendix and page number (e.g., App.A-p1).

1. *Conviction, trial and sentence [Case No. 86CR123]*

Mr. Wood was charged in 1986 with two counts of first degree murder, in violation of § 18-3-102(1)(a) and (b), Colorado Revised Statutes (1985) (first degree murder-after deliberation and first degree murder-felony murder), attempted aggravated robbery, two counts of menacing, and one count of aggravated robbery in violation of § 18-4-302 (v1p2-11,154).

The charges arose from an incident in January of 1986 in which Mr. Wood was accused of entering a pizza store, attempting to rob it and killing the assistant store manager (v1p17-18). Two other employees disarmed Mr. Wood when he attempted to flee and restrained him until the police arrived (*id.*).

The prosecution initially sought the death penalty against Mr. Wood (v1p23-24). A single lawyer represented him at the capital trial, and the same lawyer represented him on appeal (v1p34,38,281-82). The jury deadlocked on count one (after deliberation first degree murder), but signed verdict forms on all other counts, and the court declared a mistrial (v1p183-185; 273, 281).

After the mistrial, Mr. Wood signed a jury trial waiver, the constitutional validity of which he raised in his petition. The court acquitted Mr. Wood of first degree murder (after deliberation) and convicted him of the lesser included offense of second degree murder and of all other charges (v1p190-194,274). The court sentenced Mr. Wood to life in prison for murder, merging the felony murder, second degree murder and aggravated robbery counts, and to concurrent 4-year terms for menacing (v1p196).

2. *Direct appeal [Case No. 87CA0273]*

Mr. Wood was represented on direct appeal by the same lawyer who represented him in the trial court. On appeal, this lawyer challenged only the district court's denial of Mr. Wood's motion to suppress his statements (v1p197-202).

The court of appeals affirmed Mr. Wood's conviction in an unpublished decision issued May 4, 1989 (v1p197-202; Doc.15[#10], p207-215). The Colorado Supreme Court denied certiorari on December 10, 1989 (v1p260; Doc.15[#12], p220).

3. *1994 federal habeas proceeding [Case No. 94-K-219]*

In 1994, prior to the adoption of AEDPA, Mr. Wood filed a *pro se* habeas petition pursuant to 28 U.S.C. § 2254. This petition raised eight claims, five of which the magistrate determined, and Mr. Wood conceded, had never been raised in state court. The district court accordingly dismissed the petition on March 21, 1995 (*id.*, p125).

4. *State court postconviction proceedings in the district court*

a. 1995 Colorado Rule of Criminal Procedure 35(c) ["Rule 35(c)"] motion to vacate judgment

On June 29, 1995, a few months after Mr. Wood's federal habeas petition was denied for failure to exhaust state court remedies, he filed a Motion to Vacate Judgment of Conviction and Sentence, pursuant to Crim.P. 35(c), in state court, along with a motion for appointment of counsel (v1p204-212). In his motion, Mr. Wood challenged only his class one felony conviction for first degree murder.[2]

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[2] Under Colorado law, there is no time limit for filing a postconviction challenge to a class one felony conviction. *See* § 16-5-402(1), C.R.S.

This motion raised the following claims:

> 1. Mr. Wood received ineffective assistance of counsel in violation of the Fourteenth Amendment. (In support of this claim, Mr. Wood asserted that his trial counsel had given him bad legal advice concerning the offenses with which he was charged, the possible penalties and whether to testify at both his trials and whether to waive his right to jury at the second trial). (Doc.15[#3], p133-140; v1p204-212,¶ ¶ 6-12).
>
> 2. Mr. Wood's conviction for both second degree murder and felony murder violated the Double Jeopardy Clause. (*Id.* at ¶ ¶ 15-19).
>
> 3. Mr. Wood's conviction was unconstitutionally obtained through the use of an involuntary statement elicited when the defendant was physically and mentally impaired after being severely beaten. (*Id.* at ¶ ¶ 20-29).

After approximately three months passed with no activity on his motions, Mr. Wood filed a Motion to Request a Ruling on Previously Filed Motions (v1p213-214). On December 1, 1995, the district court appointed postconviction counsel for Mr. Wood (v1p215). To date, the record reflects this motion has not been ruled upon.

b. 2004 Rule 35(c) Motion to Vacate Judgment

On August 30, 2004, Mr. Wood filed a pro se Petition for Postconviction Relief Pursuant to Crim.P. 35(c) (v1p217-226). Mr. Wood claimed in this motion that:

> 1. His convictions for both second degree murder and first degree murder (felony murder) violated the Double Jeopardy Clause.
>
> 2. His constitutional right to trial by jury was violated when trial by jury was waived without the defendant's consent and without the trial court adequately inquiring into defendant's understanding of his rights; and due process of law; and
>
> 3. Defense counsel, who represented Mr. Wood at trial and on direct appeal, provided constitutionally ineffective assistance of counsel by waiving defendant's right to jury trial without his consent.

On September 3, 2004, four days after the motion was filed, the district court denied it without a hearing (Doc.15[#6] p167; v1p228-230: Order). The state court ruled that all claims, other than ineffective assistance of counsel, were procedurally barred by Mr. Wood's failure to raise the claims on direct appeal.[3] The court reached this conclusion even though it acknowledged that "[t]he Court does not have available the appellate record or the appellate decision issued by the Colorado Court of Appeals. The Court finds, however, that with each and every one of the grounds asserted could have been asserted could have been presented by the Defendant after his conviction." (Doc.15[#6] p168; v1p229).

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[3] The district court's procedural default ruling, although affirmed by the Colorado Court of Appeals, is patently wrong. Both state courts relied on Colorado Rule of Criminal Procedure 35(c)(3)(VII), which creates a procedural bar to claims that could have been raised on direct appeal but were not. This Rule, however, was adopted in 2004. When Mr. Wood filed his appeal in 1987, state law permitted individuals to bring claims in postconviction proceedings even if the claims could have been raised on direct appeal. *See* Colo.Crim.P. 35(c)(2) (1984); *see also People v. Rodriguez,* 914 P.2d 230, 254 (Colo. 1996) (rejecting government's contention that claims available on direct appeal may not be brought in a postconviction proceeding absent special circumstances); *People v. Bradley,* 169 Colo. 262, 455 P.2d 199, 200 (1969) (one may raise constitutional issues in a postconviction motion "although the same issues could have been effectively raised on [appeal]").

As a matter of due process, Mr. Wood could not lawfully be barred from asserting claims under § 2254 by virtue of a state procedural default rule that did not exist when the rule would have required him to act to preserve his claim. "[I]f a petitioner could not reasonably have been aware that a procedural rule would prevent the court from addressing the merits of his claim, his violation of that rule cannot bar federal review." *Osborn v. Shillinger,* 861 F.2d 612, 618 -621 (10th Cir. 1988).

The state court also denied the ineffective assistance of counsel claim, ruling:

> The Court has reviewed the minutes of the file regarding the criminal proceedings after the mistrial was declared and found that on January 5, 1987 the minute orders reflect that the Defendant's written waiver of right to jury trial and order was filed. Therefore the Court finds that the files and records show to the satisfaction of the Court that the factual allegation made by the Defendant is untrue and the Defendant's motion for relief on this ground is denied without hearing.

The record strongly suggests that the court did not review the actual file or even a majority of the minutes before ruling, since both the Colorado Court of Appeals decision and a written jury waiver can be easily found in the court's file (v1p187-188, 197-203). Moreover, both the court's minute orders and its file reflect that the Rule 35(c) motion which was filed in 1995 was still pending and that counsel had been appointed to represent Mr. Wood on that earlier motion.

c. 2004 Motion to Re-Examine Defendant's [Rule 35(c) Motion to Vacate]

On October 7, 2004, Mr. Wood filed a motion asking the state district court to re-examine his petition for postconviction relief (Doc.15[#6] p170-171; v1p231-232: Motion to Re-examine). Mr. Wood asked that, if the court were correct and the failure to raise issues on appeal created a procedural default, he be allowed to add a claim of appellate ineffective assistance against his trial lawyer who had also represented him on direct appeal (*Id.*).

Although Colorado courts do recognize the viability of timely motions to reconsider in criminal cases,[4] the district court denied this motion without considering his request, ruling that "no statutory right" to seek reconsideration existed. (v1p234-5).[5]

5. ***State postconviction appeal [Case No. 04CA2252]***

The district court denied Mr. Wood's request for appointment of counsel on appeal and he was *pro se* in the state appellate courts (v1p256-259).

On August 3, 2006, the court of appeals affirmed the district court's order denying postconviction relief (Doc.15[#10] p207; v1p262-269). Like the district court, the state court of appeals rejected all of Mr. Wood's challenges, except the ineffective assistance of counsel claim, because of a purported procedural default based on the defendant's failure to raise issues on direct appeal, a procedural default that did not exist at the time of defendant's direct appeal (Doc.15[#10] p211-212; v1p266-67). [*See* fn. 3, *supra* at p.8]

The Colorado Supreme Court denied Mr. Wood's petition for writ of certiorari on February 5, 2007 (v1p260).

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[4] *See, e.g., People v. Albaugh,* 949 P.2d 115, 116 (Colo.App. 1995); *Stone v. People,* 895 P.2d 1154 (Colo. App. 1995); *People v. Janke,* 852 P.2d 1271 (Colo. App. 1992).

[5] The district court's ruling was patently wrong as Mr. Wood's motion to re-examine (or reconsider) was filed before the 45-day deadline for the notice of appeal. *See* cases cited in fn. 4, above. Although there is no "statutory right" to seek reconsideration of final orders in criminal cases, Colorado courts recognize that reconsideration motions may be filed and ruled on so long as they are ruled on while the district court still has jurisdiction, i.e. before the 45-day deadline for a notice of appeal expires. *See, e.g., People v. Albaugh,* 949 P.2d 115, 117 (Colo. App.1997); *see also* Colorado Appellate Rule 4.

6. *Federal habeas proceedings [Case No. 08-cv-00247-WYD]*

Mr. Wood filed his 28 U.S.C. § 2254 habeas petition on February 5, 2008, within a year of the state supreme court's order denying certiorari (Doc.1,p5-37). The district court dismissed all but two of Mr. Wood's claims for failure to exhaust and denied the two remaining claims on their merits (Doc.25p434). *See* App.B.

7. *Certificate of Appealability*

The district court denied Mr. Wood a certificate of appealability (Doc.31 p574). The Tenth Circuit Court of Appeals, however, appointed counsel for Mr. Wood and granted a certificate of appealability on two substantive issues.[6] In addition, the court of appeals asked that the procedural issues of timeliness and procedural default based on the state courts' reliance on Crim.P. 35(c)(3)(VII) be briefed for the court. *See* App.D.

8. *The Tenth Circuit's Decision*

Having ordered briefing on the timeliness of Mr. Wood's petition, and notwithstanding the state's decision not to challenge timeliness in the district circuit court, the circuit court affirmed the district court's decision, solely on the ground the petition was untimely under 28 U.S.C. § 2244. *See* App.A.

The Tenth Circuit ruled that Mr. Wood had abandoned his 1995 Rule 35(c) motion and, thus, the tolling allowed under § 2244(d) had stopped at some point before his habeas petition was filed in 2008 resulting in the expiration of the one-year statutory limitations period.

---

[6] A COA was granted on "(1) Wood's claim that his simultaneous convictions for felony murder and second degree murder violate his right against double jeopardy under the Fifth and Fourteenth Amendments to the Constitution, and (2) Wood's claim that his decision to waive a jury trial was not 'knowing, intelligent, and voluntary.'" (App.D, p2).

The Tenth Circuit noted that it could not "override a State's deliberate waiver of a limitations defense" and *sua sponte* dismiss a petition. App.A, p5, fn.2, quoting *Day*, 547 U.S. at 202. However, the court failed to recognize that the government's statements in the district court that it was "not challenging the timeliness" of Mr. Wood's petition constitute a waiver and/or forfeiture of the defense. Instead, the appellate court wrote that it could not understand what the government meant when it said it was not challenging the defense, but whatever it meant was something not akin to a deliberate waiver:

> In their habeas answer, the Respondents provided a cryptic response to the timeliness question. They first incorporated an argument from their pre-answer response about the statute of limitations expiring before Wood filed his habeas petition, and then stated that they were "not challenging, but do not concede, the timeliness of [Wood's][habeas] petition." R., Vol. 1 at 273. While the precise import of this quotation eludes us, we conclude it is not a deliberate waiver, given that it follows an argument as to why Wood's habeas petition would be untimely, and concludes with a refusal to concede that the petition is timely. *Cf. Day*, 547 U.S. at 209 (holding that state's erroneous concession of habeas petition's timeliness did not preclude the district court from sua sponte dismissing the petition as untimely).

App.A-p5, fn.2.

Mr. Wood filed a timely petition for rehearing in which he challenged the circuit court's authority to raise the timeliness defense sua sponte when the government itself had chosen to forego the defense in the district court. (*See* 1.5.11 Petition for Rehearing at p3-9). In the alternative, Mr. Wood challenged the court's finding that his 1995 state court postconviction motion was no longer pending, as a matter of state law and as a matter of fact. (*See id.* at 10).

REASONS FOR GRANTING THE WRIT

First, the tenth circuit's decision to *sua sponte* raise the affirmative defense of timeliness and deny Mr. Wood habeas relief solely on that ground, after the government had affirmatively chosen not to challenge the timeliness of the petition i and the district court had ruled on the merits, clearly conflicts with this Court's precedent. *See Kontrick v. Ryan*, 540 U.S. 443 (2004) (non-jurisdictional timeliness defense is forfeited if not raised before district court rules on merits of claim); *Eberhart v. United States*, 546 U.S. 12 (2006) (same).

Wood v. Milyard also illustrates a serious misunderstanding of the reach of *Day v. McDonough*. 547 U.S. 198 (2006), which: (1) authorized district courts, not appellate courts, to *sua sponte* raise a timeliness defense under certain circumstances; and (2) made clear that a district court would abuse its discretion if it failed to accept the government's deliberate waiver of the defense.

In addition, the circuit's decision in *Wood* that *Day* permits an appellate court to raise a timeliness defense *sua sponte* for the first time on appeal conflicts with the only other circuit to have decided the issue. *Compare Sasser v. Norris*, 553 F.3d 1121, 1128 (5th Cir. 2009) ("The discretion to consider the statute of limitations defense *sua sponte* does not extend to the appellate level"), citing *Barnett v. Roper*, 541 F.3d 804, 807 (5th Cir. 2008).

The tenth circuit's decision in *Wood* has so far departed from the accepted and usual course of judicial proceedings that this Court should exercise its supervisory authority and, at a minimum, grant the writ, vacate the order and judgment, and remand Mr. Wood's case with instructions that the circuit court not consider the timeliness of Mr. Wood's petition since it is contrary to established federal law for an appellate court to raise a non-jurisdictional statutory limitations defense *sua sponte* when, as here, the government has chosen not to raise the defense in the district court.

In addition, this case presents an excellent factual backdrop for this Court to consider an important federal question and avoid further misapplication of the law concerning forfeiture and waiver of non-jurisdictional statutory defenses in habeas cases. A fair reading of *Day, supra,* and *Kontrick v. Ryan, supra,* establishes that the § 2244(d) time bar defense should be deemed forfeited when, as here, the respondent is afforded an opportunity in the district court to raise the defense and declines to assert it.

Day, however, does not consider the contours of what the majority meant by a "deliberate waiver" of a timeliness defense such that the district court would lack discretion to disregard the waiver by the state. Moreover, the *Day* Court was not presented with the precise issue here of whether (and, if so, under what circumstances) an appellate court may *sua sponte* inject a timeliness defense into a case when the state failed to raise it below. Nor did the Court address forfeiture of the statutory timeliness defense, although it has done so in analogous contexts. *See Kontrick, supra* (timeliness defense to creditor's objection to discharge in bankruptcy); *Eberhart, supra* (timeliness objection to motion for new trial).

The respondent here affirmatively chose not to assert the affirmative defense of timeliness in the district court. Although the government was aware that a timeliness argument could be made and explained it to the court, it chose not to assert the affirmative defense. Under these circumstances, this Court's decision in *Day v. McDonough* would forbid a district court from dismissing a petition as untimely.

The rationale underlying this Court's decision in *Day,* which allows a district court to *sua sponte* dismiss a habeas petition on timeliness grounds despite the government's erroneous calculation of the limitations period, clearly does not allow an appellate court to *sua sponte* reject a petitioner's claims solely on timeliness grounds when, as here, the state has made a strategic decision not to assert the defense in the district court and the district court has ruled on the merits.

One additional matter. The circuit court's decision to *sua sponte* raise a defense on behalf of the government for the first time on appeal, a defense that should have been deemed forfeited by the government's decision "not to challenge" timeliness when expressly offered the opportunity to do so in the district court, crosses a line toward judicial advocacy, a line over which both the majority and dissent expressed concern in *Day*. As noted by the majority, if, as the Court has held, district courts have no obligation to act as counsel for a pro se litigant, "then, by the same token, they surely have no obligation to assist attorneys representing the State." 547 U.S. at 210. And, as noted by the dissent: "Requiring the State to take the affirmative step of amending its own pleading at least observes the formalities of our adversary system, which is a nontrivial value in itself." *Day*, 547 U.S. at 217, n.2 (Scalia, J. dissenting).

Here, the circuit court appeared to act as an advocate for the state.

The tenth circuit also failed to recognize that this Court's decision in *Day v. McDonough* does not authorize an appellate court to sua sponte raise a timeliness challenge to a habeas petition after the state makes a decision not to challenge the timeliness of the petition in the district court. This Court should take certiorari to recognize that, like all non-jurisdictional affirmative defenses, the one-year limitations period in 28 U.S.C. § 2244(d) is forfeited if not raised in a timely manner.

The tenth circuit's decision that an appellate court may *sua sponte* raise the affirmative defense of timeliness, pursuant to 28 U.S.C. § 2244(d), on behalf of the government stands alone and conflicts with the decisions of other circuits that reject timeliness challenges to habeas review when made by the government for the first time on appeal.

There is, in fact, a circuit split on the question of whether an appellate court may sua sponte raise a § 2244(d) timeliness defense for the first time on appeal. The Tenth Circuit's decision in Mr. Wood's case plainly approves of an appellate court raising a statute of limitations defense *sua sponte,* after the merits of the petition have been ruled on in the district court. Upon information and belief no other circuit court appears to have done so.

In the wake of *Day v. McDonough*, only two other circuits appear to have considered a timeliness challenge to a habeas petition made for the first time on appeal. *See Sasser v. Norris*, 553 F.3d 1121, 1128 (5th Cir. 2009); *Barnett v. Roper*, 541 F.3d 804, 807 (5th Cir. 2008); *Grisby v. Cotton*, 456 F.3d 727, 731 (7th Cir. 2006). Notably, the timeliness challenges in these cases, unlike Mr. Wood's, were made by the government for the first time on appeal and not by the circuit court acting sua sponte.

The circuits are not in agreement as to the approach to be taken when a timeliness defense to a habeas petition is raised for the first time on appeal.

The Fifth Circuit acknowledges that this Court, in *Day v. McDonough*, carved out an exception to the general rule that limitations defenses are forfeited unless pled by the government. *See Barnett v. Roper*, 541 F.3d at 807. However, the Fifth Circuit has held unequivocally that the *Day* exception, which permits a district court to raise the timeliness of a state prisoner's habeas petition *sua sponte*, does not extend to appellate courts. *See id.; accord Sasser v. Norris*, 553 F.3d at 1128.

In part, the *Barnett* Court refused to extend *Day* to the appellate level because of this Court's general holding that a timeliness objection cannot be raised after the case has been decided. *Barnett, supra,* citing, *Kontrick v. Ryan*, 540 U.S. 443 (2004). In *Kontrick*, a unanimous decision authored by Justice Ginsburg, who also wrote the majority opinion in *Day*, this Court held that a debtor forfeits its right to rely on the time limit for a creditor to file objections to discharge if the debtor does not raise the issue before the bankruptcy court reaches merits of creditor's objection. In *Kontricik*, this Court distinguished between a court's subject matter jurisdiction, which cannot be expanded to account for the parties' litigation conduct and "a claim-processing rule [that], even if unalterable on a party's application, can nonetheless be forfeited if the party asserting the rule waits too long to raise the point." 540 U.S. 916. Clearly, § 2244's time bar is not jurisdictional and falls more properly in the category of a claim-processing rule that is subject to forfeiture or waiver.

In *Barnett*, the petitioner conceded that his application was twenty-five days late. *See id.*, 541 F.3d at 807. Nevertheless, the appellate court determined that by not raising timeliness in the district court, the government had forfeited the claim and could not raise it for the first time on appeal. *See id.* at 807-808.

In *Sasser*, the court expressed no opinion on the timeliness of the petition. Instead, the court plainly held that the discretion to consider the limitations defense *sua sponte* did not extend to the appellate level. "Because the government did not timely assert the statute of limitations defense, the statute of limitations defense is forfeited...." *Sasser*, 553 F.3d at 1128.

The Seventh Circuit has also declined to consider the timeliness of a state prisoner's habeas petition when raised for the first time on appeal, but has treated the issue differently than the Eighth Circuit. *See Grisby v. Cotton*, 456 F.3d 727, 731 (7th Cir. 2006). In *Grigsby*, the court treated timeliness and procedural default claims in a similar fashion and stated with respect to each that:

> [the court is] under no obligation to strictly enforce a state's forfeiture or a petitioner's procedural failings. Rather, we must decide whether the interests of justice" require a resolution of the merits of a petition despite procedural defenses raised for the first time on appeal. *Granberry v. Greer*, 481 U.S. 129, 136 (1987); see Day v. McDonough [citation omitted]; *Jones v. Hulick*, 449 F.3d 784, 787-88 (7th Cir. 2006).[7

Grrigsby, 456 F.3d at 731.

The *Grigsby* Court ruled that it would be "inappropriate" for it to reach the timeliness argument when it was not raised by the state in its response, and it did not provide a basis for the district court's decision. *See id.* It is not clear from the seventh circuit's decision whether, under these facts, it would always find forfeiture or whether it believes that, under *Day*, appellate courts retain discretionary authority to consider timeliness challenges by the government for the first time on appeal even when the government chooses not to assert the defense in the district court. Instead, after finding review of the timeliness argument would be inappropriate under the circumstances, the seventh circuit compares the holding in *Day* to the holding in *Eberhardt v. United States*, 546 U.S. 12 (2005), a case in which the government was held to have forfeited the right to

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[7] In *Jones*, the habeas petition was dismissed in the district court before the government filed a response. Thus, the government's first opportunity to raise the defense was on appeal. Under these circumstances, the court agreed to decide the timeliness issue since "the issue is not difficult. The facts are established. And, the issue is for the most part, legal. Finally, another significant factor is that the State raised the defense at its first realistic opportunity...." 449 F.3d at 787.

challenge the timeliness of the defendant's Rule 33(b) motion for new trial by waiting until after the district court had ruled on the merits before raising the timeliness of the motion.

In reaching this result, the Seventh Circuit compared this Court's decision in *Day,* which it viewed as one allowing the district court to raise timeliness *sua sponte* despite the state's erroneous concession that the habeas petition was timely, with this Court's decision in *Eberhart v. United States,* 546 U.S. 12 (2005) where the government forfeited any timeliness challenge to defendant's Rule 33(b) motion for new trial by raising it only after the district court had ruled on the merits.

And finally, the facts of this case would permit this court both to: (a) confirm that the limited exception to the traditional rule that a litigant forfeits any right to assert an affirmative defense if the defense is not raised applies only at the district court level; and (b) provide guidance as to what constitutes a "deliberate waiver" of a timeliness defense such that a court would abuse its discretion were it to dismiss a claim on timeliness grounds.

CONCLUSION

For the reasons set forth above, this Court should grant a writ of certiorari and review the decision of the United States Court of Appeals for the Tenth Circuit or, in the alternative, this Court should grant the requested writ, vacate the Tenth Circuit's decision and remand the cause with appropriate instructions to the court .

Respectfully submitted,

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APPENDIX
A

IN THE

SUPREME COURT OF THE UNITED STATES

PATRICK WOOD, *Petitioner,*

v.

KEVIN MILYARD, Warden, Sterling Correctional Facility, *Respondent.*

Slip Copy, 2010 WL 4813580 (C.A.10 (Colo.))
(Not Selected for publication in the Federal Reporter)
(Cite as: 2010 WL 4813580 (C.A.10 (Colo.)))

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Only the Westlaw citation is currently available. This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Tenth Circuit Rule 32.1. (Find CTA10 Rule 32.1)

United States Court of Appeals,
Tenth Circuit.
Patrick WOOD, Petitioner-Appellant,
v.
Kevin MILYARD, Warden, Sterling Correctional Facility; The Attorney General of the State of Colorado, Respondents-Appellees.

No. 09-1348.
Nov. 26, 2010.

Background: Defendant convicted of felony murder, second-degree murder, aggravated robbery and felony menacing petitioned pro se for a writ of habeas corpus. The United States District Court for the District of Colorado, 2009 WL 1973531, denied relief, and defendant appealed.

Holding: The Court of Appeals, Wade Brorby, Senior Circuit Judge, held that defendant's habeas petition was time-barred.

Affirmed

West Headnotes

Habeas Corpus 197 🔑603.9

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(A) In General
197k603 Limitations, Laches or Delay
197k603.9 k. Pursuit of other remedies. Most Cited Cases

Defendant's inaction and subsequent statements indicated that he had stopped attempting to exhaust state court remedies and had abandoned a 1995 state postconviction application, such that the habeas statute's tolling provision deactivated and the limitations period ran, rendering his habeas petition time-barred; after the last action on the 1995 application, defendant made no attempt to communicate with the court for any reason for over eight years, he represented in a 2004 postconviction application that "[n]o other postconviction proceedings [had been] filed," and even when the district court threatened to dismiss his federal petition as untimely, defendant never claimed an interest in the 1995 motion. 28 U.S.C.A. § 2244(d)(2).

Kathleen A. Lord, Office of the Federal Public Defender, Denver, CO, for Petitioner-Appellant.

Patricia Rae Van Horn, Attorney General for the State of Colorado, Denver, CO, for Respondents-Appellees.

Before HARTZ, Circuit Judge, PORFILIO and BRORBY, Senior Circuit Judges.

ORDER AND JUDGMENT[FN*]

WADE BRORBY, Senior Circuit Judge.

***1 State prisoner Patrick Wood appeals from a district court order that denied his pro se 28 U.S.C. § 2254 petition for habeas relief. This court granted Wood a certificate of appealability (COA) on two issues: (1) whether his convictions for felony** murder and second-degree murder violated

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double jeopardy; and (2) whether his waiver of a jury trial was valid. This court also appointed counsel for Wood and directed the parties to address the timeliness of Wood's petition and other procedural barriers to considering the merits. For the reasons expressed below, we conclude that Wood's habeas petition was untimely, and therefore, we AFFIRM.

BACKGROUND

In January 1986, Wood robbed a pizza delivery store in Westminster, Colorado. While doing so, he shot the store's assistant manager in the head, killing him. Other store employees then subdued Wood until police arrived.

Wood was charged with first-degree murder after deliberation, first-degree felony murder, aggravated robbery, and two counts of felony menacing. A jury deadlocked on the murder counts, prompting the court to declare a mistrial. Thereafter, Wood agreed to a bench trial in exchange for the prosecution's agreement to not seek the death penalty.[FN1] Following the bench trial, the court found Wood guilty on the felony-murder, robbery, and menacing counts, but guilty of only second-degree murder on the deliberate-murder count. Dist. Ct. R. at 190-94. At sentencing, the court "merged" the robbery and murder counts, and imposed a life sentence plus two four-year terms for the menacing counts, all running concurrently. *Id.* at 196. The Colorado Court of Appeals affirmed Wood's convictions, and the Colorado Supreme Court denied certiorari in 1989.

In 1994, Wood sought federal habeas relief. But since he had not exhausted his state court remedies, the district court dismissed the petition.

Consequently, in June 1995, Wood filed a pro se motion in Colorado state court to vacate his conviction and sentence under Colo. R. of Crim. P. 35(c). He argued that double jeopardy barred his convictions for both felony murder and second-degree murder, that his trial counsel was ineffective in advising him to testify, and that his interrogation statements should have been suppressed. Wood also sought appointment of postconviction counsel. Four months later, when there had been no action on his filings, Wood filed a motion seeking a ruling. In December 1995, the state court responded by appointing the Colorado Public Defender's Office to represent Wood in the postconviction proceedings.

Eight years and four months passed with nothing occurring in the case. The state court docket indicates that in April 2004, Wood wrote a letter to the court. But as his appellate counsel indicates, "inexplicably no letter is in the state court file." Aplt. Supp. Opening Br. at 21 n. 8.

On August 30, 2004, Wood filed a pro se petition, again seeking Rule 35(c) relief in state court. He again raised the double-jeopardy issue, but changed the focus of his ineffective-assistance claim to his waiver of a jury trial, and he added an equal-protection claim. On the petition's first page, Wood prominently stated that "[n]o other postconviction proceedings [had been] filed." Dist. Ct. R. at 217. The state postconviction court denied the petition. The Colorado Court of Appeals affirmed, and the Colorado Supreme Court denied certiorari on February 5, 2007.

***2** One year later, on February 5, 2008, Wood filed a petition for habeas relief in federal district court. The form used by Wood requested information about "each

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postconviction proceeding" he had initiated. R. Vol. 1 at 8. Wood listed only his 2004 state postconviction application. Accordingly, the district court ordered Wood to show cause why his petition should not be denied as time barred, given that his 2004 postconviction application tolled the Antiterrorism and Effective Death Penalty Act's (AEDPA's) one-year limitations period from only 2004 to 2007. Wood filed a lengthy response, but he never mentioned his first attempt at obtaining state postconviction relief. The district court denied Wood's habeas petition as time barred.

Wood then moved for reconsideration, and again failed to mention the 1995 postconviction motion. The district court granted reconsideration, apparently to obtain the state's view of the timeliness issue. In its pre-answer response, the state informed the district court that Wood had filed a postconviction motion in 1995, and that it was never ruled upon. Instead of revisiting the timeliness issue, the district court ordered Wood to address exhaustion issues. Ultimately, Wood dismissed his unexhausted claims, and the district court denied Wood habeas relief on the merits of his remaining claims, which raised double-jeopardy and jury-waiver issues. Wood appealed, and this court issued a COA to consider those issues, as well as issues of timeliness and exhaustion.

DISCUSSION

I. Statute of Limitations FN2

AEDPA imposes a one-year limitations period for filing a federal habeas petition. 28 U.S.C. § 2244(d)(1). Where, as here, a petitioner's conviction became final before the date of AEDPA's enactment, April 24, 1996, the limitations period is viewed as running for a year from that date, i.e., until April 24, 1997. *Serrano v. Williams,* 383 F.3d 1181, 1183 (10th Cir.2004). But "[t]his one-year period is tolled for the time 'during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending.' " *Id.* (citing 28 U.S.C. § 2244(d)(2)). Thus, the issue we confront is whether Wood's 1995 motion remained pending, thereby tolling the limitations period, from April 24, 1996, until August 30, 2004, the day he filed his second postconviction application.

"[T]he pendency of a state postconviction application ... encompass[es] all of the time during which a state prisoner is attempting, through proper use of state court procedures, to exhaust state court remedies." *Id.* at 1184 (quotation omitted). "Although the interpretation of the term 'pending' is a matter of federal law, our definition does require some inquiry into relevant state procedural laws...." *Gibson v. Klinger,* 232 F.3d 799, 806 (10th Cir.2000). Under Colorado law, a motion for postconviction relief not resolved within a reasonable time may be deemed abandoned if the defendant "fails to take reasonable efforts to secure an expeditious ruling on the motion." *People v. Fuqua,* 764 P.2d 56, 58 (Colo.1988); *see also People v. Abeyta,* 923 P.2d 318, 321-22 (Colo.App.1996) (holding that defendant's unresolved postconviction claims from an earlier Rule 35(c) motion had been abandoned where "he was fully able to pursue them in a timely manner, [but] he failed to have them considered before the expiration of the limitation period" for seeking postconviction relief), *superceded by rule on other grounds as stated in People v. Roy,* 2010 WL 2305894, at *2 (Colo.App. June 10, 2010). This is consistent with "Congress's intent to encourage exhaustion of state court remedies without allowing prisoners

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to toll the limitations period indefinitely." *Gibson,* 232 F.3d at 807. Indeed, "Congress and the courts appropriately built slack into the process by providing a *reasonable* grace period for pending applications, not for open-ended and unjustified delay in pursuing claims and relief. Tolling accommodates effort, not inaction." ***Welch v. Carey,*** 350 F.3d 1079, 1083 (9th Cir.2003) (emphasis added).

*3 The last action taken on Wood's 1995 postconviction motion was in December of that year, when the state court acted on Wood's motion for a ruling, and appointed postconviction counsel. But despite being able to seek action, Wood never again moved for a ruling. Indeed, he made no attempt to communicate with the court for any reason for over eight years. It was not until April 2004, when he sent the now-missing letter to the court, and then in August 2004, when he filed a new postconviction application, that he showed any interest in continuing to pursue relief from his convictions and sentence. [FN3]

Significantly, the fact that Wood represented in the 2004 application that "[n]o other postconviction proceedings [had been] filed," Dist. Ct. R. at 217, indicates that he had lost interest in, and had abandoned, the 1995 motion. [FN4] Similarly, he did not mention the 1995 motion when prompted by the form on which he sought federal habeas relief. Even when the district court threatened to dismiss his federal petition as untimely, Wood never claimed an interest in the 1995 motion. And when the district court dismissed the federal petition as untimely, Wood sought reconsideration without resort to the 1995 motion.

Under these unique circumstances, we conclude that Wood abandoned his 1995 motion before filing his 2004 petition. We need not decide, however, precisely when the abandonment occurred, as any break in the pendency of the 1995 motion after AEDPA's enactment renders Wood's 2008 federal habeas petition untimely. Specifically, a full year elapsed from the time the Colorado Supreme Court denied certiorari on February 5, 2007, until Wood filed his federal habeas petition on February 5, 2008. Consequently, there is no time left to account for *any* untolled period between AEDPA's April 24, 1996 enactment and Wood's 2004 postconviction application.

Wood's position appears to be that, without a ruling by the state postconviction court, his 1995 motion never stopped tolling the limitations period. But as the Respondents note, that would mean "the 1995 motion is *still* pending because it has never been ruled upon." Resp. Br. at 19. At some point, though, we must give meaning to Congress's intent in establishing a one-year limitations period. Thus, where, as here, a petitioner's inaction and subsequent statements on the limitations issue indicate that he stopped "attempting ... to exhaust state court remedies," *Serrano,* 383 F.3d at 1184, and abandoned a state postconviction application, AEDPA's tolling provision will deactivate, and the limitations period will run.[FN5]

CONCLUSION

The judgment of the district court is AFFIRMED. Wood's second motion to supplement the record is GRANTED. The motion to proceed in forma pauperis is GRANTED.

FN* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R.App. P. 34(a)(2); 10th Cir.

R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R.App. P. 32.1 and 10th Cir. R. 32.1.

FN1. Although the jury was deadlocked on the murder counts, the jury's foreman had signed the guilty verdicts on the robbery and menacing counts. Dist. Ct. R. at 183-85. It appears, however, that the bench trial involved all of the original charges filed against Wood, not just the murder charges. *See id.* at 190-94, 196.

FN2. Although the district court's ultimate disposition of this case rested on grounds other than timeliness, "we have discretion to affirm on any ground adequately supported by the record." *Davis v. Roberts,* 425 F.3d 830, 834 (10th Cir.2005) (quotation omitted); *see also Jones v. Hulick,* 449 F.3d 784, 787 (7th Cir.2006) (considering timeliness of habeas petition for first time on appeal); *White v. Klitzkie,* 281 F.3d 920, 921-22 (9th Cir.2002) (considering timeliness of habeas petition on appeal even though the issue was not decided by the district court or included in the COA). We pause for a moment, though, to note the Supreme Court's admonition that a federal court cannot "override a State's deliberate waiver of a limitations defense" and sua sponte dismiss a habeas petition. *Day v. McDonough,* 547 U.S. 198, 202, 126 S.Ct. 1675, 164 L.Ed.2d 376 (2006). In their habeas answer, the Respondents provided a cryptic response to the timeliness question. They first incorporated an argument from their pre-answer response about the statute of limitations expiring before Wood filed his habeas petition, and then stated that they were "not challenging, but do not concede, the timeliness of [Wood's] [habeas] petition." R., Vol. I at 273. While the precise import of this quotation eludes us, we conclude it is not a deliberate waiver, given that it follows an argument as to why Wood's habeas petition would be untimely, and concludes with a refusal to concede that the petition is timely. *Cf. Day,* 547 U.S. at 209, 126 S.Ct. 1675 (holding that state's erroneous concession of habeas petition's timeliness did not preclude the district court from sua sponte dismissing the petition as untimely).

Our consideration of the timeliness issue is particularly apt in this case, given that the issue was raised in the district court and addressed by Wood, the parties have briefed the issue on appeal, and the interests of justice would be served in reaching the timeliness issue given the extensive time period involved. *Cf. id.* at 210, 126 S.Ct. 1675 (instructing courts considering the issue of timeliness sua sponte to "assure ... that the petitioner is not significantly prejudiced by the delayed focus on the limitation issue, and determine whether the interests of justice would be better served by addressing the merits or by dismissing the petition as time barred" (quotation omitted)).

FN3. Even if the April 2004 letter was an attempt to inform the court of appointed counsel's inaction or to inquire about the status of his 1995 motion, we think it came too late. But more fundamentally, we question whether the letter in fact mentioned anything about the 1995 motion, given that Wood's August 2004 postconviction petition stated that no other postconviction applications had been filed.

FN4. If we were to blindly accept Wood's assertion that his 2004 postconviction application were his first, the limitations period for filing a federal habeas petition would have expired on April 24, 1997-over a decade before he filed his 2008 petition for habeas relief. *See Clark v. Oklahoma,* 468 F.3d 711, 714 (10th Cir.2006) ("Only state petitions for post-conviction relief filed within the one year allowed by AEDPA will toll the statute of limitations.").

FN5. Although "the timeliness provision in the federal habeas corpus statute is subject to equitable tolling," *Holland v. Florida,* ---U.S. ----, 130 S.Ct. 2549, 2554, 177 L.Ed.2d 130 (2010), Wood concedes that "[t]he availability of equitable tolling is not an issue." Aplt. Supp. Opening Br. at 23. In any event, equitable tolling requires "(1) that [Wood] has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Holland,* 130 S.Ct. at 2563 (quotation omitted). For the same reasons discussed above in regard to statutory tolling, we conclude that Wood did not diligently pursue his 1995 motion for state postconviction relief. Therefore, he does not qualify for equitable tolling.

C.A.10 (Colo.),2010.
Wood v. Milyard
Slip Copy, 2010 WL 4813580 (C.A.10 (Colo.))

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APPENDIX
B

IN THE

SUPREME COURT OF THE UNITED STATES

PATRICK WOOD, *Petitioner*,

v.

KEVIN MILYARD, Warden, Sterling Correctional Facility, *Respondent*.

Slip Copy, 2009 WL 1973531 (D.Colo.)
(Cite as: 2009 WL 1973531 (D.Colo.))

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Only the Westlaw citation is currently available.

United States District Court,
D. Colorado.
Patrick WOOD, Applicant,
v.
Kevin MILYARD, Warden, Sterling Correctional Facility, and The Attorney General of the State of Colorado, Respondents.

Civil Action No. 08-cv-00247-WYD.
July 6, 2009.

Patrick Wood, Sterling, CO, pro se.

Patricia Rae Van Horn, Colorado Attorney General's Office-Department of Law, Denver, CO, for Respondents.

ORDER DENYING 28 U.S.C. § 2254 APPLICATION

WILEY Y. DANIEL, Chief Judge.

*1 Applicant, Patrick Wood, is a prisoner in the custody of the Colorado Department of Corrections (DOC) who currently is incarcerated at the Sterling, Colorado, correctional facility. On February 5, 2008, Mr. Wood filed *pro se* an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He paid the $5.00 filing fee.

In the application, Mr. Wood asserted five claims: (1)(a) that convicting him of both felony murder and second-degree murder of the same victim and of aggravated robbery violates double jeopardy principles and (b) that convicting him of aggravated robbery and then using that offense as the predicate offense for the felony murder conviction violates double jeopardy principles; (2) that the waiver of his right to a jury trial on the murder counts was involuntary because defense counsel's advisement was inadequate and because the trial judge accepted his waiver without ensuring that it was made knowingly and voluntarily; (3) that his convictions were obtained in violation of his right not to incriminate himself, i.e., defense counsel advised him to testify at trial, which caused him to incriminate himself; (4) that his convictions were the result of ineffective assistance of both trial and appellate counsel, and specifically that trial counsel "was ineffective for advising [him] to waive his right to a second jury trial" and to "waive his right against self incrimination," in "failing to advocate on [his] behalf, and in failing to "move for the 1 st Degree Felony Murder to be stricken from the trial judge's consideration" at the bench trial "or at least in the alternative in failing to accurately replay the implications of the felony murder statute to [him]" and "in failing to identify obvious and key issues on direct appeal," *see* application at 6a; and (5) that the felony murder statute violates equal protection principles because "it disproportionately imposes the same punishment on one who commits a murder with premeditation after deliberation, as on one who has no intent to kill whatsoever and accidentally does so during the course of a felony." *See* application at 6a-6b.

I. *Federal Court Proceedings*

On January 26, 1994, Mr. Wood filed a habeas corpus application in this court. On March 22, 1995, the Honorable John L. Kane accepted and adopted the August 1, 1994, recommendation of former Magistrate Judge Richard M. Borchers; denied the application for failure to exhaust state

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remedies; and dismissed the action. *See Wood v. Furlong,* No. 94-cv-00219-JLK (D.Colo. Mar. 22, 1995).

On February 5, 2008, Mr. Wood filed *pro se* the instant habeas corpus application. In an order filed on May 29, 2008, Magistrate Judge Boyd N. Boland ordered the respondents to file within twenty days a pre-answer response limited to addressing the affirmative defenses of timeliness under 28 U.S.C. § 2244(d) and/or

exhaustion of state court remedies under 28 U.S.C. § 2254(b)(1)(A). On June 17, 2008, the respondents filed their pre-answer response asserting that the instant action was subject to dismissal as a mixed petition containing both exhausted and unexhausted claims. On July 7, 2008, Mr. Wood filed a reply to pre-answer response.

*2 Magistrate Judge Craig B. Shaffer reviewed the pre-answer response, the reply, and the relevant appellate court briefs, and agreed that claims 1(b), 3, 4, and 5 did not appear to have been exhausted. Therefore, in an order filed on August 15, 2008, Magistrate Judge Shaffer directed Mr. Wood to show cause within thirty days why the application should not be denied as a mixed petition. Alternatively, the magistrate judge informed Mr. Wood that rather than have the court dismiss the application as a mixed petition, he would be allowed to dismiss voluntarily the unexhausted claims and proceed on the exhausted claims.

On September 15, 2008, Mr. Wood submitted his response titled "Objection to Finding of Unexhausted Claims, and Motion to Dismiss Voluntarily Claims Deemed Unexhausted and to Proceed on Exhausted Claims." In the September 15 response, Mr. Wood moved to dismiss voluntarily unexhausted claims 1(b), 3, 4, and 5, and asked only to proceed on exhausted claims 1(a) and 2. In an order filed on September 22, 2008, Senior Judge Zita L. Weinshienk construed Mr. Wood's objection to the finding of unexhausted claims as filed pursuant to 28 U.S.C. § 636(b)(1)(A), overruled the objection, granted Mr. Wood's motion for voluntary dismissal, dismissed unexhausted claims 1(b), 3, 4, and 5, and allowed Mr. Wood to proceed only on exhausted claims 1(a) and (2). On September 22, 2008, the action was reassigned to me.

On October 2, 2008, I ordered the respondents to file an answer on or before October 31, 2008. On October 30, 2008, the respondents filed their answer. On April 14, 2009, I ordered the respondents to provide me with the record from the state court trial. On April 20, 2009, the respondents provided the state court trial record.

I must construe liberally any filings by Mr. Wood because he is not represented by an attorney. *See Haines v. Kerner,* 404 U.S. 519, 520-21 (1972); *Hall v. Bellmon,* 935 F.2d 1106, 1110 (10th Cir.1991). However, I should not be an advocate for a *pro se* litigant. *See Hall,* 935 F.2d at 1110. For the reasons stated below, I will review the remaining claims 1(a) and (2) on the merits, dismiss them as meritless, and deny the instant application.

II. *State Court Proceedings*

In 1986, Mr. Wood was charged in Adams County District Court Criminal Action No. 86CR123 with first-degree murder after deliberation, first-degree murder felony murder (felony murder), aggravated robbery, and two counts of felony menacing for shooting and killing the assistant

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manager of a pizza delivery store in Westminster, Colorado. A jury found him guilty of the aggravated robbery and felony menacing counts, but was unable to reach a verdict on the murder counts. In exchange for withdrawing the death penalty from consideration, Mr. Wood waived his right to a jury trial on the murder counts and, at a subsequent bench trial, the trial court found him guilty of felony murder and second-degree murder. During sentencing on January 21, 1987, the trial court merged the murder and aggravated robbery counts, and sentenced

> *3 him to the DOC for forty years to life on the merged counts and to four-year terms on the two menacing counts, to run concurrently with the life sentence.

On May 4, 1989, Mr. Wood's convictions were affirmed on direct appeal. *See People v. Wood,* No. 87CA0273 (Colo.Ct.App. May 4, 1989) (not published). On October 23, 1989, the Colorado Supreme Court denied certiorari review. On June 29, 1995, Mr. Wood filed in state court a motion for appointment of counsel, an affidavit of indigency, and a motion to vacate judgment of conviction and sentence. *See* answer, ex. C; *see also* answer, ex. D, register of actions at 12. However, despite the fact that on October 30, 1995, Mr. Wood filed a request for a ruling on the previously filed motions, the trial court apparently only ruled on the motion for appointment of counsel, granting it on December 1, 1995. *See* answer, ex. D, register of actions at 12.

On August 19, 2004, Mr. Wood filed a postconviction motion pursuant to Rule 35(c) of the Colorado Rules of Criminal Procedure, which the trial court denied on September 3, 2004. On August 3, 2006, the Colorado Court of Appeals affirmed. *See People v. Wood,* No. 04CA2252 (Colo.Ct.App. Aug. 3, 2006) (not published). On February 5, 2007, the Colorado Supreme Court denied certiorari review. On February 5, 2008, Mr. Wood filed *pro se* the instant habeas corpus application in this court.

III. *Standard of Review on the Merits*

Title 28 U.S.C. § 2254(d) provides that a writ of habeas corpus may not be issued with respect to any claim that was adjudicated on the merits in state court unless the state court adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

Claims of legal error and mixed questions of law and fact are reviewed pursuant to 28 U.S.C. § 2254(d)(1). *See Cook v. McKune,* 323 F.3d 825, 830 (10th Cir.2003). The threshold question pursuant to § 2254(d)(1) is whether Mr. Wood seeks to apply a rule of law that was clearly established by the Supreme Court at the time his conviction became final. *See Williams v. Taylor,* 529 U.S. 362, 390 (2000). Clearly established federal law "refers to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." *Id.* at 412. Furthermore,

> clearly established law consists of Supreme Court holdings in cases where the

> facts are at least closely-related or similar to the case *sub judice*. Although the legal rule at issue need not have had its genesis in the closely-related or similar factual context, the Supreme Court must have expressly extended the legal rule to that context.

***4** *House v. Hatch*, 527 F.3d 1010, 1016 (10th Cir.2008).

If there is no clearly established federal law, that is the end of my inquiry pursuant to 28 U.S.C. § 2254(d)(1). *See id.* at 1018. If a clearly established rule of federal law is implicated, I must determine whether the state court's decision was contrary to or an unreasonable application of that clearly established rule of federal law. *See Williams*, 529 U.S. at 404-05.

A state-court decision is contrary to clearly established federal law if: (a) "the state court applies a rule that contradicts the governing law set forth in Supreme Court cases"; or (b) "the state court confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a result different from [that] precedent." *Maynard [v. Boone]*, 468 F.3d [665,] 669 [(10th Cir.2006)] (internal quotation marks and brackets omitted) (quoting *Williams*, 529 U.S. at 405). "The word 'contrary' is commonly understood to mean 'diametrically different,' 'opposite in character or nature,' or 'mutually opposed.' " *Williams*, 529 U.S. at 405 (citation omitted).

A state court decision involves an unreasonable application of clearly established federal law when it identifies the correct governing legal rule from Supreme Court cases, but unreasonably applies it to the facts. *Id.* at 407-08. Additionally, we have recognized that an unreasonable application may occur if the state court either unreasonably extends, or unreasonably refuses to extend, a legal principle from Supreme Court precedent to a new context where it should apply.

House, 527 F.3d at 1018.

My inquiry pursuant to the "unreasonable application" clause is an objective inquiry. *See Williams*, 529 U.S. at 409-10. "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather that application must also be unreasonable." *Id.* at 411. "[A] decision is 'objectively unreasonable' when most reasonable jurists exercising their independent judgment would conclude the state court misapplied Supreme Court law." *Maynard*, 468 F.3d at 671. "[O]nly the most serious misapplications of Supreme Court precedent will be a basis for relief under [28 U.S.C.] § 2254." *Id.*

Claims of factual error are reviewed pursuant to 28 U.S.C. § 2254(d)(2). *See Romano v. Gibson*, 278 F.3d 1145, 1154 n. 4 (10th Cir.2002). Section 2254(d)(2) allows me to grant a writ of habeas corpus only if the state court decision was based on an unreasonable determination of the facts in light of the evidence presented. Pursuant to § 2254(e)(1), I must presume that the state court's factual determinations are correct and Mr. Wood bears the burden of rebutting the presumption by clear and convincing evidence. "The standard is demanding but not insatiable ... [because] '[d]eference does not by definition preclude relief.' " *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003)).

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***5** I "owe deference to the state court's result, even if its reasoning is not expressly stated." *Aycox v. Lytle,* 196 F.3d 1174, 1177 (10th Cir.1999). Therefore, I "must uphold the state court's summary decision unless [my] independent review of the record and pertinent federal law persuades [me] that its result contravenes or unreasonably applies clearly established federal law, or is based on an unreasonable determination of the facts in light of the evidence presented." *Id.* at 1178. "[T]his 'independent review' should be distinguished from a full de novo review of the petitioner's claims." *Id.*

Finally, if the state court does not address a claim on the merits, I must review the claim *de novo* and the deferential standards in 28 U.S.C. § 2254(d) are not applicable. *See Gipson v.. Jordan,* 376 F.3d 1193, 1196 (10th Cir.2004).

IV. *Claims*

Only remaining claims 1(a) and 2 currently are before me. I initially will address Mr. Wood's claim 1(a) that convicting him of both felony murder and second-degree murder of the same victim and of aggravated robbery violates double jeopardy principles. Upon current briefing, it appears that claim 1(a) may be procedurally defaulted. Because this court already stated that the issue of exhaustion would not be addressed further and because claim 1(a) previously was determined to have been exhausted, I feel compelled, in the interest of fairness to Mr. Wood, to address claim 1(a) on the merits. *See Cannon v. Mullin,* 383 F.3d 1152, 1159 (10th Cir .2004) (When questions of procedural bar are problematic, and the substantive claim can be disposed of readily, a federal court may exercise its discretion to bypass the procedural issues and reject a habeas claim on the merits.) (citing *Romero v. Furlong,* 215 F.3d 1107, 1111 (10th Cir.2000)). Because the state courts did not address the merits of the federal habeas corpus claim Mr. Wood raises here, I will exercise my own independent judgment in deciding the claim. *See Gipson,* 396 F.3d at 1196.

In his motion to vacate judgment of conviction and sentence filed on June 29, 1995 Mr. Wood asserted that convicting him of both felony murder and second-degree murder of the same victim violates double jeopardy principles, a claim which the state courts never addressed on the merits. In addition to the claim Mr. Wood raised in his 1995 postconviction motion, Mr. Wood also argues before me that convicting him of aggravated robbery violates double jeopardy principles, as well. Specifically, he alleges that:

> Petitioner was convicted of both 1 st Degree Felony Murder, and 2nd Degree Felony Murder and Aggravated Robbery, which violates principles of Double Jeopardy, and resulted in conviction of two separate murder counts for a single victim, and in being twice convicted for Aggravated Robbery, as an underlying felony for the Felony Murder count and separate as its own charge.

Application at 5.

A person may be prosecuted for more than one crime based on the same conduct if each crime requires proof of a fact that the other does not. *Blockburger v. United States,* 284 U.S. 299, 304 (1932); *United States v. Pearson,* 203 F.3d 1243, 1267-68 (10th Cir.2000).

***6** I have reviewed the versions of the relevant Colorado statutes in effect at the time Mr. Wood was charged and convicted.

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A person committed the crime of murder in the first degree, felony murder, a class one felony, if "[a]cting either alone or with one or more persons, he commits or attempts to commit ... robbery ... and, in the course of or in furtherance of the crime that he is committing or attempting to commit, or of immediate flight therefrom, the death of a person, other than one of the participants, is caused by anyone." Colo.Rev.Stat. § 18-3-102(1)(b) (1978 Repl.Vol.). A person committed second-degree murder, a class two felony, if he "causes the death of a person knowingly, but not after deliberation." Colo.Rev.Stat. § 18-3-103(1)(a) (1978 Repl.Vol.). A person who committed robbery was guilty of aggravated robbery, a class three felony, if "during the act of robbery or immediate flight therefrom [h]e ... by the use of force, threats, or intimidation with a deadly weapon knowingly puts the person robbed or any other person in reasonable fear of death or bodily injury." Colo.Rev.Stat. § 13-4-302(1)(b) (1978 Repl.Vol.).

After review of the relevant Colorado statutes in effect in Colorado at the time Mr. Wood was charged and convicted, I find it clear that the crimes of felony murder, second-degree murder, and aggravated robbery require different proof and are separate and distinct crimes. Therefore, I find that Mr. Wood's convictions for the crimes at issue do not violate *Blockburger*.

As his second claim, Mr. Wood alleges that the waiver of his right to a jury trial on the murder counts was involuntary because defense counsel's advisement was inadequate and because the trial judge accepted his waiver without ensuring that it was made knowingly and voluntarily. A defendant is entitled to a jury trial, but he may waive that right so long as he does so knowingly, voluntarily, and intelligently. *See, e.g., United States v. Robertson,* 45 F.3d 1423, 1431-32 (10th Cir.1995) (citing *Adams v.. U.S. ex rel. McCann,* 317 U.S. 269, 275 (1942), and *Patton v. United States,* 281 U.S. 276, 312 (1930). Specifically, a defendant may waive his Sixth Amendment right to a jury trial when: (1) he gives "express, intelligent consent"; (2) the government consents; and (3) the waiver is "approved by the responsible judgment of the trial court." *Adams,* 317 U.S. at 277-78. The adequacy of a jury trial waiver is a mixed question of law and fact. *United States v. Farris,* 77 F.3d 391, 396 (11th Cir.1996). Mixed questions of law and fact are reviewed pursuant to § 2254(d)(1). *See Cook,* 323 F.3d at 830.

The state court record contains a written jury trial waiver, dated January 5, 1987, bearing Mr. Wood signature. The waiver states, in relevant part:

> I, Patrick Wood, having been advised of my constitutional right to a trial to a jury of twelve as well as the statutory right contained in C.R.S. 18-1-406, hereby waive my right to a jury and agree to have the matter tried to the Court. I understand the following rights:
>
> *7 1. I am charged in the above-captioned action with, among other things, first degree murder (two counts).
>
> 2. There has previously been a jury trial in this action and the jury was hopelessly deadlocked and a mistrial was declared at my insistence.
>
> 3. I understand that my waiver of jury must be voluntary meaning not the result of any promise, threat or coercion but rather that the waiver is the result of talk-

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> ing this matter over with my attorney, thinking about it and making my own decision to waive the jury in the above-captioned action.
>
> 4. It is the advice of my counsel that a jury be waived and the matter tried to the Court but I understand that it is completely my decision whether to have the fact finder in my case be a judge or a jury.
>
> 5. After thought and consultation with my lawyer and my family, I voluntarily ask this Court to receive my waiver of a jury and ask the Judge to be the fact finder in this case.

Answer, ex. M, waiver of jury trial; *see also* trial tr., vol. I at 187, Jan. 5, 1987.

A minute order from January 5, 1987, the day Mr. Wood signed the waiver, states, in pertinent part:

> COURT HEARS STATEMENTS OF COUNSEL & DEFENDANT. DEFENDANT SIGNS WAIVER OF RIGHT TO JURY TRIAL. DDA WAIVES PEOPLE'S RIGHT TO JURY TRIAL.

Trial tr., vol. I at 274, Jan. 5, 1987.

The Colorado Court of Appeals in No. 04CA2252 rejected Mr. Wood's claim because the record clearly showed that his jury trial waiver was valid:

> Here, defendant admits that he signed a written waiver of his right to a jury trial but asserts that it is not valid because he was not "personally questioned by the district court assuring that the waiver was voluntary, knowing and intelligently entered." However, the record contains defendant's written waiver form and a minute order indicating, "[C]ourt hears statements of counsel and defendant. Defendant signs waiver of right to jury trial. DDA waives People's right to jury trial."

Answer, ex. J, No. 04CA2252, slip op. at 6.

I find that the decision of the state appeals court that Mr. Wood's jury trial waiver was knowing, voluntary, and intelligent did not result in a decision that was contrary to, or involved an unreasonable application of, clearly established federal Supreme Court law. *See* 28 U.S.C. § 2254(d)(1).

V. *Conclusion*

For the reasons stated above, habeas corpus relief will be denied. Accordingly, it is

ORDERED that the remaining claims 1(a) and (2) are dismissed as meritless, the habeas corpus application is denied, and the action is **DISMISSED WITH PREJUDICE.** It is

FURTHER ORDERED that each party shall bear his own costs and attorney's fees.

D.Colo.,2009.
Wood v. Milyard
Slip Copy, 2009 WL 1973531 (D.Colo.)

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APPENDIX
C

IN THE

SUPREME COURT OF THE UNITED STATES

PATRICK WOOD, *Petitioner*,

v.

KEVIN MILYARD, Warden, Sterling Correctional Facility, *Respondent*.

H
Only the Westlaw citation is currently available.

United States District Court,
D. Colorado.
Patrick WOOD, Applicant,
v.
Kevin MILYARD, Warden, Sterling Correctional Facility, and The Attorney General of the State of Colorado, Respondents.

Civil Action No. 08-cv-00247-BNB.
Sept. 22, 2008.

Patrick Wood, Sterling, CO, pro se.

Patricia Rae Van Horn, Colorado Attorney General's Office-Department of Law, Denver, CO, for Respondents.

ORDER TO OVERRULE OBJECTION, DISMISS IN PART, AND DRAW REMAINING CLAIMS TO A DISTRICT JUDGE AND TO A MAGISTRATE JUDGE

ZITA L. WEINSHIENK, Senior District Judge.

*1 Applicant, Patrick Wood, is a prisoner in the custody of the Colorado Department of Corrections (DOC) who currently is incarcerated at the Sterling, Colorado, correctional facility. Mr. Wood filed *pro se* an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (2006). He paid the $5.00 filing fee.

In an order filed on May 29, 2008, Magistrate Judge Boyd N. Boland ordered Respondents to file within twenty days a Pre-Answer Response limited to addressing the affirmative defenses of timeliness under 28 U.S.C. § 2244(d) and/or exhaustion of state court remedies under 28 U.S.C. § 2254(b)(1)(A). On June 17, 2008, Respondents filed their Pre-Answer Response asserting that the instant action is subject to dismissal as a mixed petition containing both exhausted and unexhausted claims. On July 7, 2008, Mr. Wood filed a Reply to Pre-Answer Response.

In an order filed on August 15, 2008, Magistrate Judge Craig B. Shaffer directed Mr. Wood to show cause within thirty days why the application should not be denied as a mixed petition. Alternatively, Magistrate Judge Shaffer informed Mr. Wood that rather than have the Court dismiss the application as a mixed petition, he would be allowed to dismiss voluntarily the unexhausted claims and proceed on the exhausted claims. On September 15, 2008, Mr. Wood submitted his response titled "Objection to Finding of Unexhausted Claims, and Motion to Dismiss Voluntarily Claims Deemed Unexhausted and to Proceed on Exhausted Claims."

The Court must construe liberally the application, the Reply, and the combination objection and partial voluntary dismissal filed by Mr. Wood because he is not represented by an attorney. *See Haines v. Kerner,* 404 U.S. 519, 520-21 (1972); *Hall v. Bellmon,* 935 F .2d 1106, 1110 (10th Cir.1991). However, the Court should not be an advocate for a *pro se* litigant. *See Hall,* 935 F.2d at 1110. In the combination objection and partial voluntary dismissal, Mr. Wood appears to object to Magistrate Judge Shaffer's August 15, 2008, order directing him to show cause why the application should not be denied as a mixed petition and to his finding that certain asserted claims are unexhausted. For the reasons stated below, the objection will be construed as filed pursuant to 28 U.S.C. §

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636(b)(1)(A), and will be overruled.

Pursuant to § 636(b)(1)(A), a judge may reconsider any pretrial matter designated to a magistrate judge to hear and determine where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law. The Court has reviewed the file and finds that Magistrate Judge Shaffer's August 15, 2008, order is not clearly erroneous or contrary to law. Therefore, Mr. Wood's objection will be overruled. For the reasons stated below, the August 15 "Motion to Dismiss Voluntarily Claims Deemed Unexhausted and to Proceed on Exhausted Claims" will be granted.

Mr. Wood alleges that he was convicted in 1986 in Adams County District Court Criminal Action No. 86CR123 on charges of second-degree murder, first-degree felony murder, aggravated robbery, and felony menacing. The trial court sentenced him to the DOC for forty years to life. He alleges that on January 21, 1987, the judgment of conviction was entered. On May 4, 1989, his convictions were affirmed on direct appeal. *See People v. Wood,* No. 87CA0273 (Colo.Ct.App. May 4, 1989) (not published). On October 23, 1989, the Colorado Supreme Court denied certiorari review.

***2** On January 26, 1994, he filed a habeas corpus application in this Court, which on March 22, 1995, accepted and adopted former Magistrate Judge Richard M. Borchers' August 1, 1994, recommendation, and denied the application for failure to exhaust state remedies. *See Wood v. Furlong,* 94-cv-00219-JLK (D.Colo. Mar. 22, 1995). On June 29, 1995, Mr. Wood filed in state court a motion for appointment of counsel, an affidavit of indigency, and a motion to vacate judgment of conviction and sentence. *See* Response at ex. D. However, despite the fact that on October 30, 1995, Mr. Wood filed a request for a ruling on the previously filed motions, the trial court apparently only ruled on the motion for appointment of counsel, granting it on December 1, 1995. *See* Response at ex. D.

Mr. Wood alleges that on August 19, 2004, he filed a postconviction motion pursuant to Rule 35(c) of the Colorado Rules of Criminal Procedure, which the trial court denied on September 3, 2004. On August 3, 2006, the Colorado Court of Appeals affirmed. *See People v. Wood,* No. 04CA2252 (Colo.Ct.App. Aug. 3, 2006) (not published). On February 5, 2007, the Colorado Supreme Court denied certiorari review. On February 8, 2008, Mr. Wood filed the instant habeas corpus application.

Pursuant to 28 U.S.C. § 2254(b)(1), an application for a writ of habeas corpus may not be granted unless it appears that the applicant has exhausted state remedies or that no adequate state remedies are available or effective to protect the applicant's rights. *See O'Sullivan v. Boerckel,* 526 U.S. 838 (1999); *Dever v. Kansas State Penitentiary,* 36 F.3d 1531, 1534 (10th Cir .1994). The exhaustion requirement is satisfied once the federal claim has been presented fairly to the state courts. *See Castille v. Peoples,* 489 U.S. 346, 351 (1989). Fair presentation requires that the federal issue be presented properly "to the highest state court, either by direct review of the conviction or in a postconviction attack." *Dever,* 36 F.3d at 1534.

Furthermore, the "substance of a federal habeas corpus claim" must have been presented to the highest state court in order to satisfy the fair presentation requirement. *Picard v. Connor,* 404 U.S. 270, 278

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(1971); *see also Nichols v. Sullivan,* 867 F.2d 1250, 1252 (10th Cir.1989). Although fair presentation does not require a habeas corpus petitioner to cite "book and verse on the federal constitution," *Picard,* 404 U.S. at 278 (internal quotation marks omitted), "[i]t is not enough that all the facts necessary to support the federal claim were before the state courts." *Anderson v. Harless,* 459 U.S. 4, 6 (1982) (per curiam). A claim must be presented as a federal constitutional claim in the state court proceedings in order to be exhausted. *See Duncan v. Henry,* 513 U.S. 364, 365-66 (1995) (per curiam).

Finally, "[t]he exhaustion requirement is not one to be overlooked lightly." *Hernandez v. Starbuck,* 69 F.3d 1089, 1092 (10th Cir.1995). A state prisoner bringing a federal habeas corpus action bears the burden of showing that he has exhausted all available state remedies. *See Miranda v. Cooper,* 967 F.2d 392, 398 (10th Cir.1992) . Even if state remedies properly have been exhausted as to one or more of the claims presented, a habeas corpus application is subject to dismissal as a mixed petition unless state court remedies have been exhausted for all of the claims raised. *See Rose v. Lundy,* 455 U.S. 509, 522 (1982); *Harris v. Champion,* 48 F.3d 1127, 1133 (10th Cir.1995).

*3 Mr. Wood asserts five claims: (1)(a) that convicting him of both felony murder and second-degree murder of the same victim violates double jeopardy principles and (b) that convicting him of aggravated robbery and then using that offense as the predicate offense for the felony murder conviction violates double jeopardy principles; (2) that the waiver of his right to a jury trial on the murder counts was involuntary because defense counsel's advisement was inadequate and because the trial judge accepted his waiver without ensuring that it was made knowingly and voluntarily; (3) that his convictions were obtained in violation of his right not to incriminate himself, i.e., defense counsel advised him to testify at trial which caused him to incriminate himself; (4) that his convictions were the result of ineffective assistance of both trial and appellate counsel, and specifically that trial counsel "was ineffective for advising [him] to waive his right to a second jury trial" and to "waive his right against self incrimination," in "failing to advocate on [his] behalf, and in failing to "move for the 1st Degree Felony Murder to be stricken from the trial judge's consideration" at the bench trial "or at least in the alternative in failing to accurately replay the implications of the felony murder statute to [him]" and "in failing to identify obvious and key issues on direct appeal," *see* application at 6a; and (5) that the felony murder statute violates equal protection principles because "it disproportionately imposes the same punishment on one who commits a murder with premeditation after deliberation, as on one who has no intent to kill whatsoever and accidentally does so during the course of a felony." *See* application at 6a-6b.

Respondents conceded that Mr. Wood exhausted state court remedies for subpart (a) of claim 1 and for claim 2 in his 2004 postconviction motion. They argued that Mr. Wood failed to exhaust state court remedies for subpart (b) of claim 1, and for claims 3, 4, and 5. Respondents specifically contended that claims 1(b) and 3 have not been presented to the state courts. They maintained that the allegations in claim 3 were part of the ineffective assistance of counsel claim that Mr. Wood raised in his 1995 postconviction motion, which was never ruled upon by the state courts, but were not presented as a self-incrimination claim.

Respondents further contended that claim 4 contains allegations of ineffective assistance of counsel that have not been presented to state court. They specifically contended that in the 1995 postconviction motion, Mr. Wood asserted that counsel was ineffective for advising him to testify that his shooting of the victim was an accident, and for failing to explain the law applicable to lesser-included offenses and the offenses of which he would be convicted. They further contended that in the 2004 postconviction motion, Mr. Wood asserted that counsel was ineffective for waiving his right to a jury trial on the murder counts without his consent, a claim that both the trial court and the Colorado Court of Appeals rejected on the merits. The state appeals court did not consider an additional allegation of ineffective assistance of counsel, i.e., that counsel was ineffective for advising Mr. Wood to testify at trial, because Mr. Wood made the allegation for the first time in his reply brief. Lastly, Respondents argued that claim 5 has not been presented to the state courts, although they maintained that Mr. Wood did raise a different equal protection claim in his 2004 postconviction motion, i.e., that the first-degree and second-degree murder statutes violate equal protection because there is no distinguishable difference between the two crimes, which was rejected by both the trial court and the Colorado Court of Appeals on the basis that it could have been raised on direct appeal.

*4 Magistrate Judge Shaffer reviewed the relevant appellate court briefs, and agreed that claims 1(b), 3, 4, and 5 do not appear to have been exhausted. In his "Motion to Dismiss Voluntarily Claims Deemed Unexhausted and to Proceed on Exhausted Claims," Mr. Wood voluntarily dismisses unexhausted claims 1(b), 3, 4, and 5, and asks only to proceed on exhausted claims 1(a) and 2. Accordingly, it is

ORDERED that the "Objection to Finding of Unexhausted Claims" submitted on September 15, 2008, by Applicant, Patrick Wood, is overruled. It is

FURTHER ORDERED that the "Motion to Dismiss Voluntarily Claims Deemed Unexhausted and to Proceed on Exhausted Claims" submitted on September 15, 2008, by Applicant is granted. It is

FURTHER ORDERED that unexhausted claims 1(b), 3, 4, and 5 are dismissed. It is

FURTHER ORDERED that Applicant is allowed to proceed only on exhausted claims 1(a) and 2. It is

FURTHER ORDERED that the remaining claims 1(a) and (2) and the action are drawn to a district judge and to a magistrate judge.

D.Colo.,2008.
Wood v. Milyard
Not Reported in F.Supp.2d, 2008 WL 4368609 (D.Colo.)

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APPENDIX
D

IN THE

SUPREME COURT OF THE UNITED STATES

PATRICK WOOD, *Petitioner*,

v.

KEVIN MILYARD, Warden, Sterling Correctional Facility, *Respondent*.

FILED
United States Court of Appeals
Tenth Circuit

January 4, 2010

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

PATRICK WOOD,

Petitioner-Appellant,

v.

KEVIN MILYARD, Warden Sterling Correctional Facility, and THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents-Appellees.

No. 09-1348

(D.C. No. 1:08-CV-00247-WYD)
(D. of Colo.)

ORDER

Before **TYMKOVICH**, Circuit Judge.

Patrick Wood, a state prisoner acting pro se,[1] filed an application for a writ of habeas corpus in United States District Court. The court denied relief, and Wood now seeks permission to appeal.

This case concerns a conviction under Colorado law that became final twenty years ago. Wood has filed numerous actions in state and federal court since that time, and his petition presents several complex procedural and substantive issues. Exercising jurisdiction under 28 U.S.C. §§ 1291 and 2253(c), we hold that two of Wood's claims are "adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see Allen v. Zavaras*, 568 F.3d 1197, 1198 (10th Cir. 2009) (granting a COA "on a single, narrow issue").

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[1] Because he proceeds pro se, we construe Wood's filings liberally. *Freeman v. Watkins*, 479 F.3d 1257, 1259 (10th Cir. 2007).

We therefore GRANT a certificate of appealability (COA) on two issues only: (1) Wood's claim that his simultaneous convictions for felony murder and second degree murder violate his right against double jeopardy under the Fifth and Fourteenth Amendments to the Constitution, and (2) Wood's claim that his decision to waive a jury trial was not "knowing, intelligent, and voluntary." As explained below, we further appoint Wood counsel to assist in arguing his appeal.

In granting a COA on these claims, we recognize they may be subject to dismissal for various procedural reasons. We will analyze these procedural matters further when we hear the substance of Wood's appeal, and we direct the parties to address those matters in their briefing before this court. We DENY a COA as to Wood's remaining claims.

I. Background

A. Wood's Crimes and Convictions in State Court

In 1986, Wood shot and killed the assistant manager of a Colorado pizza delivery store during a botched robbery. He was tried before a jury in state court for his crimes, but the proceedings resulted in a mistrial. On the advice of counsel, he subsequently waived his right to a jury, proceeded with a trial to the bench, and was convicted of various crimes.

With regard to the homicide, Wood was convicted of both first degree felony murder under Colorado Revised Statutes § 18-3-102(1)(b) and second degree murder under Colorado Revised Statutes § 18-3-103. For sentencing purposes, the state court "merged" his two murder convictions and his conviction for armed robbery and sentenced him to a single term of life imprisonment for all three crimes. *See* R. at 150. The two separate murder convictions, however, remain on the state court records.

Wood unsuccessfully completed his direct appeal on October 23, 1989, when the Colorado Supreme Court denied certiorari. Over the past twenty years, Wood has continued to challenge his convictions in state and federal court.

B. Wood's First Federal Habeas Petition and His State Court Petitions for Post-Conviction Relief

In 1994, Wood filed a pro se petition for a writ of habeas corpus in United States District Court, which the court dismissed on the ground that Wood had not exhausted his state court remedies with respect to the constitutional claims he alleged. *See* R. at 122, 125. In 1995, he filed a pro se Motion to Vacate Judgment of Conviction and Sentence in state court. From the docket sheet, it appears that the only action the state court took regarding this post-conviction motion was to appoint Wood counsel. *Id.* at 153. For the eight years following the appointment of counsel, nothing else occurred, and Wood did not request a ruling.

In 2004, Wood revived his state court proceedings when he filed a Petition for Postconviction Relief. *See id.* at 153. This time, however, the petition was ruled upon and disposed of. The court denied all but one of Wood's claims on the ground that they were procedurally defaulted as a matter of state law, either because they were untimely filed or because they violated Colorado Rule of Criminal Procedure 35(c)(3)(VII). That rule denies post-conviction relief for any claim that "could have been presented in an appeal previously brought." The court denied Wood's remaining claim—which alleged ineffective assistance of trial counsel regarding Wood's waiver of his right to a jury trial—on the merits without granting a hearing. R. at 167–69. The Colorado Court of Appeals affirmed, and the Colorado Supreme Court denied certiorari on February 5, 2007. *See id.* at 207–214, 238.

C. The Instant Federal Habeas Application

On February 5, 2008, Wood filed the instant habeas application in United States District Court. Wood presented six constitutional claims, which the district court described as follows:

> (1)(a) that convicting him of both felony murder and second-degree murder of the same victim violates double jeopardy principles and (b) that convicting him of aggravated robbery and then using that offense as the predicate offense for the felony murder conviction violates

> double jeopardy principles; (2) that the waiver of his right to a jury trial on the murder counts was involuntary because defense counsel's advisement was inadequate and because the trial judge accepted his waiver without ensuring that it was made knowingly and voluntarily; (3) that his convictions were obtained in violation of his right not to incriminate himself, i.e., defense counsel advised him to testify at trial, which caused him to incriminate himself; (4) that his convictions were the results of ineffective assistance of both trial and appellate counsel . . . ; and (5) that the [Colorado] felony murder statute violates equal protection principles . . . .

R. at 251–52 (D. Ct. Dkt., Doc. 17, Aug. 15, 2008 Order to Show Cause).

After the district court ordered briefing from the parties on various procedural matters, Wood voluntarily dismissed four of his claims due to his failure to exhaust state court remedies. Only claims (1)(a) and (2) survived, and the court denied relief on the merits for these remaining claims.

II. Discussion

The district court found that four of Wood's constitutional claims were never properly presented to a state court and were therefore unexhausted. In response, Wood voluntarily dismissed them. We find that the district court's order upholding this voluntary dismissal was neither "debatable" nor "wrong." *Slack*, 529 U.S. at 484. But Wood's remaining claims—(1)(a) and (2)—present difficult procedural and merits questions, and we therefore grant a COA as to those claims.

A. Failure to Exhaust State Court Remedies

The district court determined that claims (1)(b), (3), (4), and (5) were unexhausted under 28 U.S.C. § 2254(b)(1)(A) and consequently ordered Wood to "show cause . . . why the habeas corpus application should not be denied as a mixed petition." R. at 253 (D. Ct. Dkt., Doc. 17, Aug. 15, 2008 Order to Show Cause). As an alternative to dismissal of the petition in its entirety, the court also provided Wood the option to "dismiss voluntarily the unexhausted claims and proceed with the exhausted claims." *Id.*; *see also Fairchild v. Workman*, 579 F.3d 1134, 1156 (10th Cir. 2009) (noting that when faced with a mixed habeas petition, the district court may allow the petitioner to "dismiss the unexhausted claims and proceed with the exhausted claims" (quoting *Harris v. Lafler*, 553 F.3d 1028, 1031 (6th Cir. 2009))).

Wood chose the latter course. Although he maintained he had properly exhausted all of his constitutional claims, Wood informed the district court that he "hereby dismisses voluntarily the claims that are deemed unexhausted, and wishes to proceed on his exhausted claims." R. at 259 (D. Ct. Dkt., Doc. 18). The court accepted this decision and dismissed claims (1)(b), (3), (4), and (5). *See* R. at 267 (D. Ct. Dkt., Doc. 19, Sept. 22, 2008 Order).

In seeking a COA, Wood "maintains that it was error for the district Court to rule that his other Habeas Corpus Claims were not exhausted." Pet'r Opening Br. at 10. Wood, however, is bound by his decision to dismiss his unexhausted claims, notwithstanding his pro se status. *See Tapia v. Lemaster*, 172 F.3d 1193, 1196 (10th Cir. 1999) ("Mr. Tapia argues that he should not be held accountable for the decision to pursue only the exhausted claims because he was pro se. . . . Mr. Tapia's pro se status does not justify reconsideration of the choice he made in his prior habeas matter." (internal citation omitted)).

Wood has therefore failed to show that the district court's decision to dismiss his unexhausted claims—at Wood's own request—was debatable or wrong. *See Coppage v. McKune*, 534 F.3d 1279, 1281 (10th Cir. 2008) (setting forth the standard for granting a COA to review a procedural ruling). We deny him a COA as to claims (1)(b), (3), (4), and (5).[2]

---

[2] It appears Wood presented a version of claim (5) to the Colorado District Court in his August 19, 2004 Petition for Postconviction Relief. *See* R. at 163–65. In claim (5), Wood asserts the Colorado felony murder statute under which he was convicted violates Fourteenth Amendment equal protection principles because it "disproportionately imposes the same punishment on one who commits a murder with premeditation . . . on one who has no intent to kill whatsoever." *Id.* at 11–12 (Application for a Writ of Habeas Corpus). This claim, however, is clearly without merit. *See Ragland v. Hundley*, 79 F.3d 702, 706 (8th Cir. 1996) ("Ragland . . . argues that his equal protection rights are violated by the felony-murder doctrine. He argues that felony murder itself amounts to an impermissible classification because only felony murderers are liable for murders that they did not intentionally aid and abet. . . . [I]t is perfectly rational and permissible for a state to equate knowing participation in [the underlying] felonies with . . . the murders which foreseeably ensue." (footnote omitted)). We therefore deny a COA on claim (5) on the alternative ground that it lacks merit. *See Davis v. Roberts*, 425 F.3d 830, 834 (10th Cir. 2005) (holding that we may deny a COA "on any ground adequately supported by the record" (quoting *Elkins v. Comfort*, 392 F.3d 1159, 1162 (10th Cir. 2004))).

B. Wood's Remaining Claims

After the voluntary dismissal, only two of Wood's claims remain. In claim (1)(a), Wood asserts his simultaneous convictions for felony murder and second degree murder violate his right against double jeopardy under the Fifth and Fourteenth Amendments to the Constitution. In claim (2), Wood asserts that the waiver of his jury trial rights was unconstitutional because it was based upon "improper and erroneous" advice on the part of his trial counsel and his trial judge did not independently assess the adequacy of his waiver.

As an initial matter, both of these claims might be subject to dismissal due to the potential untimeliness of Wood's application for habeas corpus. Moreover, the claims might also be barred from our consideration—at least in part—due to an independent and adequate state procedural rule. The district court did not address these procedural matters and instead decided claims (1)(a) and (2) on the merits, although the claims present difficult legal questions. We therefore grant a COA as to claims (1)(a) and (2).

1. Untimeliness

Soon after Wood filed the instant habeas application, the district court ordered him to "show cause why the application should not be denied as time-barred" under the limitations period of the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2244(d). R. at 40 (D. Ct. Dkt., Doc. 2, Feb.

19, 2008 Order to Show Cause). Wood complied with this order and filed a lengthy response.

In his response to the show cause order, Wood implied that his 1995 Motion to Vacate Judgment of Conviction and Sentence, which he filed in state court, tolled the AEDPA statute of limitations under § 2244(d)(2) and *Carey v. Saffold*, 536 U.S. 214 (2002). *See* R. at 50–52 (D. Ct. Dkt., Doc. 3, March 20, 2008 Resp. to Show Cause Order). Section 2244(d)(2) states that the AEDPA statute of limitations is tolled while "a properly filed application for State post-conviction or other collateral review . . . is *pending*." (emphasis added). *Carey* held that a state application for post-conviction review remains "pending" under § 2244(d)(2) "until the application has achieved final resolution through the State's post-conviction procedures." 536 U.S. at 220. The district court rejected these arguments, holding that "[i]t is clear on the face of the [habeas] application that this action is time-barred." R. at 73 (D. Ct. Dkt., Doc. 5, Apr. 3, 2008 Order of Dismissal).

Wood subsequently filed a motion to reconsider, restating his arguments regarding the timeliness of his federal habeas application. *See* R. at 82 (D. Ct. Dkt., Doc. 9). The court did not address the substance of any of these arguments, but nonetheless granted the motion to reconsider. *See* R. at 92–93 (D. Ct. Dkt., Doc. 11, May 22, 2008 Order). The court then ordered the respondent to file a Pre-Answer Response to address timeliness under § 2244(d) and exhaustion of state court remedies under § 2254(b)(1)(A). *See* R. at 95 (Pre-Answer Response). But again, the court never addressed or analyzed the issue of timeliness under AEDPA; as discussed above, Wood voluntarily dismissed his unexhausted claims, and the district court proceeded to adjudicate the merits of the remaining claims.

It is therefore an open question whether Wood's current habeas application was timely filed under AEDPA. Wood's conviction became final in 1990, after the Colorado Supreme Court denied certiorari to review his direct appeal and Wood failed to seek review in the United States Supreme Court. *See Hall v. Scott*, 292 F.3d 1264, 1266 (10th Cir. 2002). And although Wood filed a federal petition for habeas corpus in 1994—prior to AEDPA's 1996 effective date—the instant application was filed in 2008 and is clearly subject to AEDPA's limitations period. *See May v. Workman*, 339 F.3d 1236, 1237 (10th Cir. 2003) (citing § 2244(d)(1) and *Fisher v. Gibson*, 262 F.3d 1135, 1142 (10th Cir. 2001)).

Moreover, it appears Wood took no action in state court to pursue his 1995 Motion to Vacate Judgment of Conviction and Sentence. Indeed, after the state court appointed counsel for Wood, the next two docket entries in the state court records relating to Wood are a letter from Wood to the court and Wood's petition for post-conviction relief—both of which he filed pro se in 2004, nine years after the court appointed counsel to pursue his 1995 motion. *See* R. at 153. Wood's apparently dilatory behavior calls into question his eligibility for the tolling provision of § 2244(d)(2) and his eligibility for equitable tolling. *See May*, 339

F.3d at 1237 (holding that merely filing requests for documents in state court does not toll the AEDPA limitations period under § 2244(d)(2)); *Gibson v. Klinger*, 232 F.3d 799, 807 (10th Cir. 2000) (holding that state prisoners are not allowed to toll the AEDPA limitations period "indefinitely" by "beginning a [state legal] process and abandoning it"); *see also Burger v. Scott*, 317 F.3d 1133, 1141 (10th Cir. 2003) (equitable tolling under AEDPA is unavailable unless the petitioner has pursued his claims diligently).

The limitations period contained in AEDPA is central to its purpose of bringing finality to state court criminal judgments. *See Herrera v. Lemaster*, 301 F.3d 1192, 1198 (10th Cir. 2002) ("In enacting AEDPA 'Congress wished to curb delays, to prevent 'retrials' on federal habeas, and to give effect to state convictions to the extent possible under law.'" (quoting *Williams v. Taylor*, 529 U.S. 362, 404 (2000))). And even though the district court did not rely upon the AEDPA limitations period to dispose of Wood's habeas application, we may rely upon it in disposing of his appeal. *See Davis v. Roberts*, 425 F.3d 830, 834 (10th Cir. 2005) (holding that we may deny habeas relief "on any ground adequately supported by the record" (quoting *Elkins v. Comfort*, 392 F.3d 1159, 1162 (10th Cir. 2004))).

Because the timeliness of Wood's instant habeas application is an important preliminary matter, briefing by the parties on this issue would assist in the determination of this appeal. We therefore order the parties to address the timeliness of Wood's habeas application in their briefing to this court.

2. *Claim (1)(a): Double Jeopardy*

Wood presented his double jeopardy claim to state court in his 2004 petition for post-conviction relief, but the court disposed of the claim on procedural grounds, finding it barred under Colorado Rule of Criminal Procedure 35(c)(3)(VII). *See* R. at 31–32 (*People v. Wood*, No. 04CA2252, Slip. Op. at 4–5 (Colo. Ct. App. Aug. 3, 2006)); *see also* Colo. R. Crim. P. 35(c)(3)(VII) ("The court shall deny any claim that could have been presented in an appeal previously brought or postconviction proceeding previously brought . . . ."). Below, the district court acknowledged the potential procedural default, but nonetheless proceeded to address the merits of Wood's double jeopardy claim. R. at 442 (D. Ct. Dkt., Doc. 25, July 6, 2009 Order) ("Upon current briefing, it appears that claim 1(a) may be procedurally defaulted. . . . [But] I feel compelled, in the interest of fairness to Mr. Wood, to address claim 1(a) on the merits.").[3]

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[3] In his briefing to the district court, Wood argued he had failed to assert his double jeopardy claim on direct appeal—and had consequently failed to comply with Colorado Rule of Criminal Procedure 35(c)(3)(VII)—due to the ineffective assistance of his appellate counsel. R. at 48 (D. Ct. Dkt., Doc. 15). He made the same argument to the Colorado courts when his 2004 Petition for Post-Conviction Relief was denied. R. at 171, 176. According to Wood, his appellate counsel's ineffectiveness was cause for his failure to comply with state procedural rules. The district court did not address this contention, but the parties should address it in their briefing to this court.

Analyzing the claim de novo, the district court held that Wood's simultaneous convictions for first degree felony murder and second degree murder are not a violation of Wood's double jeopardy rights. In the district court's view, because each of the two Colorado murder statutes require proof of a legal element not found in the other, they pass the test articulated by the Supreme Court in *Blockburger v. United States*, 284 U.S. 299 (1932). Thus, according to the district court, Wood's dual murder convictions do not amount to an impermissible multiple punishment.

The test in *Blockburger*, however, is merely a tool to assist federal courts in ascertaining the intent of a legislature—generally, legislatures are not presumed to have authorized multiple punishments for a single offense. *See Missouri v. Hunter*, 459 U.S. 359, 366–68 (1983); *see also White v. Howes*, 586 F.3d 1025, 1031 (6th Cir. 2009); *Lucero v. Kerby*, 133 F.3d 1299, 1316 (10th Cir. 1998). On the other hand, a court does not violate double jeopardy principles when it imposes multiple punishments for a single offense which have been authorized by the relevant legislature. *Lucero*, 133 F.3d at 1316 ("[T]he Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." (quoting *Hunter*, 459 U.S. at 366)). Here, because Wood's convictions were made under state law, we must defer to the decisions of the Colorado Supreme Court in assessing whether Wood's two murder convictions were authorized by the legislature. *See White*, 586 F.3d at 1031; *Lucero*, 133 F.3d at 1316.

Reading his pro se filings generously, Wood contends the Colorado General Assembly did not intend to impose multiple convictions for a single homicide. Wood cites various cases from the Colorado Supreme Court to support this argument. *See People v. Hickam*, 684 P.2d 228, 231 (Colo. 1984) ("[The defendant] was convicted on the first-degree felony murder charge and of the lesser included offense of second-degree murder. A defendant may not be convicted of both . . . . Accordingly, the second-degree murder conviction is reversed . . . ."); *People v. Lowe*, 660 P.2d 1261, 1270–71 (Colo. 1983) ("Only one conviction of murder is permitted for the killing of one victim . . . . It would be a strange system of justice that would permit the defendant to be sentenced to two . . . sentences for the killing of one person." (internal citation omitted)); *see also People v. White*, 64 P.3d 864, 876 (Colo. Ct. App. 2002) ("Only one conviction of murder is permitted for the killing of one victim.").

In response, the state argues that prior to sentencing, "the trial court merged the second degree murder conviction . . . into the felony murder conviction and imposed a single sentence," and as a result, Wood's double jeopardy rights were not violated. *See* Resp. to Req. for COA at 10. But this argument does not resolve Wood's double jeopardy claim. The Supreme Court has held that a second conviction—even without an additional sentence—violates a defendant's double jeopardy rights when the second conviction has not been authorized by the legislature. *See Ball v. United States*, 470 U.S. 856, 865 (1985) ("Thus, the second conviction, *even if it results in no greater sentence*, is an impermissible punishment." (emphasis added)); *United States v. Hernandez*, 94 F.3d 606, 612 (10th Cir. 1996) ("[T]he district court merged the two charges and imposed no sentence for the conspiracy conviction . . . . However, the court did not vacate the conspiracy *conviction* itself." (emphasis in original)); *cf. United States v. Shorter*, 328 F.3d 167, 173 (4th Cir. 2003) ("[H]ere there is no duplicative conviction to be vacated because the district court merged the duplicative counts *into a single conviction*." (emphasis added)).

Given the relevant case law, Wood has carried his burden to show that the district court's disposition of his double jeopardy claim was "debatable." *Slack*, 529 U.S. at 484. We therefore grant Wood a COA on claim (1)(a). Nonetheless, because Wood failed to raise double jeopardy on direct appeal, and because the state courts found the claim to be procedurally defaulted when Wood presented it in his 2004 petition for post-conviction relief, we direct the parties to brief the question whether the claim is barred from our consideration under the independent and adequate state ground doctrine.

3. *Claim (2): Invalid Waiver of Right to Jury Trial*

Wood's case was first tried to a jury in state court, which found him guilty of robbery and felony menacing but deadlocked on the murder charges. At

Wood's request, the court declared a mistrial. *See* R. at 149, 432. Instead of electing to have his case retried by a jury, Wood agreed to a bench trial in exchange for the prosecution's withdrawal of the death penalty from consideration. *See* Application for COA at 4.

In claim (2), Wood asserts the waiver of his Sixth Amendment right to a jury trial was not "knowing, intelligent, and voluntary," because his trial counsel "improperly and erroneously advised [him] to waive" his rights. Pet'r Opening Br. at 9. Specifically, Wood alleges his trial counsel told Wood he had a "friendly relationship with the trial judge," and on account of this relationship, the judge would be "lenient" and "find [Wood] innocent of the murders." *Id.* at 8–9. Wood styles his challenge to his bench trial as both a claim for ineffective assistance of counsel as well as a claim for an invalid waiver of his constitutional rights. *See* Application for COA at 4.

In state post-conviction proceedings, the Colorado Court of Appeals analyzed the issue under ineffective assistance of counsel standards. *See* R. at 32 (*People v. Wood*, No. 04CA2252, Slip. Op. at 5 (Colo. Ct. App. Aug. 3, 2006)). The court reasoned that, due to Wood's failure to raise the issue on direct appeal, the only cognizable claim Wood could present regarding his jury trial waiver was an ineffective assistance of counsel claim. *See id.* at 31–32; *see also* Colo. R. Crim. P. 35(c)(3)(VIII) ("Notwithstanding (VII) above, the court shall not deny a postconviction claim of ineffective assistance of trial counsel on the ground that all or part of the claim could have been raised on direct appeal.").

Below, however, the district court did not address the issue under ineffective assistance standards, but rather analyzed only whether Wood's waiver was "knowing, voluntary, and intelligent." R. at 444–46 (D. Ct. Dkt., Doc. 25, July 6, 2009 Order). The district court examined a signed waiver Wood submitted to the trial court, in which he asserted his jury trial waiver was "not the result of any promise, . . . but rather that the waiver is the result of talking this matter over with my attorney, thinking about it, and making my own decision to waive the jury." *Id.* at 432. The district court also noted that the state court record contains at least some evidence of a colloquy between Wood and the trial court discussing his decision to waive a jury trial. *See id.* at 445 (D. Ct. Dkt., Doc. 25, July 6, 2009 Order).

Given the procedural history, Wood's jury trial waiver claim is potentially barred from our consideration due to an independent and adequate state procedural rule, namely Colorado Rule of Criminal Procedure 35(c)(3)(VII).[4] His ineffective assistance of counsel claim relating to the jury trial waiver, however, is cognizable in federal habeas because it was addressed and disposed of on the merits in state court.

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[4] Again, Wood has argued there is cause for his procedural default, namely that his appellate counsel was ineffective. *See* R. at 48 (D. Ct. Dkt., Doc. 15). The parties should address this issue in their briefing to this court.

In light of the district court's failure to address Wood's ineffective assistance of counsel claim, we conclude Wood has shown the district court's disposition of his jury trial waiver claim was "debatable." *Slack*, 529 U.S. at 484. We therefore grant a COA as to claim (2). We direct the parties to address any procedural issues pertinent to this claim in their briefing to the court.

III. Conclusion

For the reasons set forth above, we GRANT a COA on claims (1)(a) and (2). We DENY a COA as to the remaining claims asserted in Wood's habeas application.

Additionally, because disposition of this case, and the interests of justice, would be aided by the appointment of counsel, the office of the Federal Public Defender for the Districts of Wyoming and Colorado is appointed to represent Wood on appeal. *See* 18 U.S.C. § 3006A(a)(2)(B). New counsel may borrow the hard copy of the record on appeal maintained in the clerk's office. In addition, the record is available electronically on the court's docket. Within ten days of the date of this order, new counsel shall submit an entry of appearance to this court.

In addition, counsel for Wood shall file a supplemental opening brief as to claims (1)(a) and (2) described above. The brief should specifically address the merits of those claims, as well as the timeliness of Wood's application for writ of habeas corpus under AEDPA and any state procedural rules that might bar our consideration of claims (1)(a) and (2).

Petitioner's supplemental brief addressing the foregoing is due on or before March 5, 2010. Within thirty days after service of petitioner's brief, respondent shall also file a brief addressing the foregoing. Petitioner may file a reply brief within fourteen days of service of respondent's brief if he so desires. All briefs shall be filed and served in compliance with Federal Rules of Appellate Procedure 28 and 31.

Entered for the Court

Elisabeth A. Shumaker

Elisabeth A. Shumaker
Clerk of Court

NO. ____

IN THE

SUPREME COURT OF THE UNITED STATES

Patrick Wood, *Petitioner,*

v.

KEVIN MILYARD, Warden, Sterling Correctional Facility, *Respondent.*

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

AFFIDAVIT OF SERVICE

Kathleen A. Lord, Assistant Federal Public Defender for the District of Colorado, hereby attests that pursuant to Supreme Court Rule 29, the preceding Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit and the accompanying Motion for Leave to Proceed *In Forma Pauperis* were served on counsel for the Respondent by enclosing a copy of these documents in an envelope, first-class postage prepaid and addressed to:

Patricia Rae Van Horn
Assistant Attorney General
Appellate Division, CJS
1525 Sherman St. 7th Floor
Denver, CO 80203

It is further attested that the envelope was deposited with the United States Postal Service, Denver, Colorado 80202, on April 7, 2011, and all parties required to be served have been served.

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STATE OF COLORADO)
) ss
COUNTY OF DENVER)

Subscribed and sworn to before me this 7th day of April, 2011.

Cassandra Hill

Cassandra Hill
Notary Public

My Commission Expires: 6·21·2014

CASSANDRA HILL

NO. ____

IN THE

SUPREME COURT OF THE UNITED STATES

Patrick Wood, *Petitioner,*

v.

KEVIN MILYARD, Warden, Sterling Correctional Facility, *Respondent.*

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

AFFIDAVIT OF MAILING

Kathleen A. Lord, Assistant Federal Public Defender, a member of the Bar of this Court, hereby attests that pursuant to Supreme Court Rule 29, the preceding Petition for Writ of Certiorari to the Court of Appeals for the Tenth Circuit and the accompanying Motion for Leave to Proceed *In Forma Pauperis* were enclosed in an envelope, first-class postage prepaid and addressed to:

Clerk of Court
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

It is further attested that the envelope was deposited with the United States Postal Service, Denver, Colorado 80202, on April 7, 2011, and all parties required to be served have been served.

KATHLEEN A. LORD
Assistant Federal Public Defender

STATE OF COLORADO)
) ss
COUNTY OF DENVER)

Subscribed and sworn to before me this 7TH day of April, 2011.

Cassandra Hill

Cassandra Hill
Notary Public

My Commission Expires: 6 21 2014

CASSANDRA HILL

My Commission Expires

OPPOSITION
BRIEF

No. 10-9995

IN THE SUPREME COURT OF THE UNITED STATES

Patrick Wood,

Petitioner,

vs.

Kevin Milyard, Sterling Correctional Facility, and
The Attorney General of the State of Colorado,

Respondents.

On Petition for Writ of Certiorari to
United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION

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ISSUES PRESENTED

1. Whether it was appropriate for the Tenth Circuit to affirm the district court's denial of petitioner's §2254 application on a ground different from the ground relied on by the district court and adequately supported by the record.

2. Whether *Day v. McDonough*, 547 U.S. 198 (2006), should be effectively overruled to the extent *Day* rejected a rule treating a party's failure initially to plead the one-year time bar as an absolute waiver.

STATEMENT OF THE CASE AND FACTS

Petitioner's convictions arose out of an incident that occurred in January 1986 when he "attempted an armed robbery of a pizza delivery store in Westminster, [Colorado] during which he shot and killed the assistant manager. [Petitioner] was subdued by two employees after a scuffle" (doc.#15-1).[1] *People v. Wood*, (Colo. App. No. 87CA0273, May 4, 1989) (not selected for publication) (*Wood I*).

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[1] All citations in the form "doc.#__" are to the district court docket number.

As stated by the Colorado Court of Appeals:

> Defendant was charged with first degree murder after deliberation, felony murder, aggravated robbery, and two counts of felony menacing. A jury found defendant guilty of aggravated robbery and felony menacing but was unable to reach a verdict on the murder charges. In exchange for withdrawing the death penalty from consideration, defendant waived his right to a jury trial on the murder counts. Thereafter, at a bench trial, the court found defendant guilty of felony murder and second degree murder.
>
> During sentencing, the trial court merged the murder and aggravated robbery counts. The court sentenced defendant to life in the Department of Corrections on the merged counts and to four years each for the two felony menacing counts.

(Doc.#15-10).

Petitioner directly appealed his convictions challenging only the trial court's suppression ruling. The Colorado Court of Appeals affirmed his convictions in an unpublished opinion (doc.#15-1). *Wood I.* The Colorado Supreme Court denied certiorari review on October 23, 1989.

In 1994, petitioner filed an application under 28 U.S.C. §2254 in *Wood v. Furlong*, 94-cv-00219-JLK-RMB. The magistrate judge recommended that the petition be dismissed for failure to exhaust state remedies, finding that petitioner had a remedy in state court because a collateral attack would not be subject to any period of limitation under Colorado law (doc.#15-2). The district judge accepted the recommendation and dismissed the case.

In June 1995, petitioner filed motions for appointment of counsel and to vacate his convictions and sentence. As relevant here, he claimed trial counsel was ineffective by advising him to testify,[2] and that his convictions for first degree felony murder and second degree murder violated double jeopardy (doc.#15-3). Four months later, petitioner filed a motion requesting a ruling on his motions. The court responded by appointing counsel (doc.#15-4).

The state court register of actions indicates petitioner took no further action until eight years and four months later in April 2004 when he filed a letter with the court (doc.#15-4). As the letter is not in the record, something petitioner conceded below in his Tenth Circuit brief, the contents of the letter is unknown.

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[2] Petitioner incorrectly maintains that his 1995 motion included a claim challenging trial counsel's advice as to his jury trial waiver.

In August 2004, petitioner filed a second motion for postconviction relief. Petitioner stated in the motion that "[n]o other postconviction proceedings were filed" (doc.#15-5).

The motion asserted a number of claims. As relevant here, petitioner again alleged that his murder convictions violated double jeopardy. Petitioner also asserted a claim of ineffective assistance of trial counsel. However, the ground was different from the ground asserted in the 1995 motion. Instead of challenging counsel's advice about testifying, this time petitioner alleged that counsel was ineffective "because he waived the defendant's right to trial by jury without the consent of defendant." Petitioner also raised a free-standing claim that his jury trial waiver was invalid because his waiver was through counsel and not by petitioner himself (doc.#15-5).[3]

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[3] The motion raised additional claims, and conceded that the waiver was in exchange for the prosecution's not seeking the death penalty.

The trial court summarily denied the motion. The court ruled that claims going to the second degree murder conviction were time barred, and that all but the ineffective assistance claim could have been raised on direct appeal.[4] And as to the ineffective assistance claim, the court found the minute orders reflected that petitioner had filed a written waiver of jury trial. From this the court concluded that petitioner's factual allegations were untrue (doc.#15-6).

Petitioner appealed the trial court's order. His arguments in his opening brief were consistent with the claims presented in his postconviction motion (doc.#15-7). However, for the first time in his reply brief he added a new ground supporting his ineffective assistance claim, namely, that his signed waiver was based solely on counsel's statement that he was friends with the judge and promised petitioner the judge would be lenient (doc.#15-9).

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[4] Colo. R. Crim. P. 35(c)(3) was amended effective July 1, 2004, to specifically provide for this procedural bar. The amended rule applies to motions filed after the effective date. *See People v. Versteeg*, 165 P.3 760, 763 (Colo. App. 2006); *People v. Wenzinger*, 155 P.3d 415, 418 (Colo. App. 2006). As such, petitioner incorrectly asserts that the state courts erred in applying Colo. R. Crim. P. 35(c)(3)(VII). In any event, petitioner's challenge to the state courts' postconviction ruling is not cognizable for at least three reasons: (1) he did not challenge the application of Crim. P. 35(c)(3)(VII) in state court; (2) any errors occurring during collateral review are not of constitutional magnitude, *see, e.g.*, *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987); and (3) federal habeas relief is not available for errors of state law. *Estelle v. McGuire*, 502 U.S. 62, 67 (1991). The same is true for petitioner's claim that the state trial erred in refusing to consider his motion for reconsideration.

The Colorado Court of Appeals affirmed the trial court's order in all aspects. With regard to the ineffective assistance claim, the court found the record clearly established that petitioner signed a written waiver of right to jury trial (doc.#15-10). The Colorado Supreme Court denied certiorari review on February 5, 2007 (doc.#15-12).

Exactly one year later, petitioner filed the federal habeas application that is the subject of this appeal. Where the preprinted form directed him to identify state postconviction proceedings that he had initiated, he identified only the 2004 proceeding.

The application raised five numbered claims, with Claim 1 raising two distinct claims: (a) the same double jeopardy claim raised in state court, and (b) a separate challenge to his aggravated robbery conviction. Claim 2 raised petitioner's invalid jury trial waiver claim, but supported the claim on different grounds than he made in his state appellate opening brief. Instead of arguing that the waiver was invalid because it was through counsel and not a personal waiver, petitioner reasserted the claim he made for the first time in his state appellate reply brief, namely, that counsel had failed to adequately inform petitioner that a bench trial was likely to result in a conviction of felony murder, and improperly advised petitioner that the judge would be lenient based on counsel's friendship with the judge. Claim 4 conclusorily asserted various grounds supporting a claim of ineffective assistance of trial and appellate counsel, including and without explanation that "[c]ounsel was ineffective in advising petitioner to waive his right to a second jury trial . . . ."[5]

A magistrate judge issued an order to show cause why the petition should not be denied as time barred (doc.#2). The order stated that "in the absence of any reason to toll the limitations period, Mr. Wood should have initiated this action prior to April 24, 1997 . . . ."

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[5] Claims 3 and 5 are unrelated to the present appeal and were never presented to the state courts.

In his response, petitioner asserted that Colorado law provided no time limit to collaterally attack his felony murder conviction, and that the order denying his 1994 federal habeas petition had stated "that there is no time limit for [petitioner] to appeal" (doc.#4). He stated he "diligently exhausted his claims through the State courts, which failed to hear his claims on the merits," but did not mention the 1995 motion. Petitioner provided various reasons why he did not initiate a state postconviction proceeding before 2004, including various transfers between facilities, including a transfer out of state, and recovery from back surgery, after which "he once again began researching his claims and filed a C.R.C.P. 35(c) motion for post-conviction relief in August of 2004" (*id.*). Again, petitioner did not mention his 1995 motion.

The district court dismissed the petition as time barred. The court found that petitioner's response did not contest the magistrate judge's calculations, and provided no explanation for his lack of diligence to pursue his claims prior to his 1997 transfer (doc.#5).

Petitioner filed a motion for reconsideration, primarily relying on the magistrate judge's statement in the 1994 federal habeas proceeding that there was no time limit to exhaust his claims (doc.#9). The motion did not mention the 1995 motion. The district court granted the motion without explanation, and ordered the Respondents to file a pre-answer response addressing the issues of timeliness and exhaustion (doc.#11,12).[6]

Respondent's response made the following argument with regard to timeliness:

> As previously noted, Wood filed postconviction motions in the state district court in 1995 and 2004. It is clear that if Wood had filed only the 2004 motion his habeas petition would be untimely because the motion was filed long after his time for filing a habeas petition had passed. But it is unclear how the 1995 postconviction motion, which apparently was never ruled upon, affects the timeliness of Wood's habeas petition. While it is certainly arguable that the 1995 postconviction motion was abandoned before 1997 and thus did not toll the AEDPA statute of limitations at all, *see People v. Mamula*, 847 P.2d 1135 (Colo. 1993) (Crim. P. 35(b) motion for reduction of sentence deemed abandoned as a matter of law where circumstances were such that 20-omonth delay in seeking a ruling was

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[6] The Tenth Circuit surmised that "[t]he district court granted reconsideration, apparently to obtain the state's view of the timeliness issue."

> unreasonable), Respondents will not challenge, *but are not conceding*, the timeliness of Wood's habeas petition in this pre-answer response.

(Doc.#15) (emphasis added).

With regard to exhaustion, Respondents maintained that Claim 1(a) had been presented in the 2004 motion, but that the references to federal law were merely to "'the Double Jeopardy Clause of the United States' and 'U.S.C.A. AMENDMENT V,' without discussion, except to discuss his convictions in relation to Colorado state law . . . ." Respondents further maintained that a claim similar to Claim 2 had been presented in a different form in the 2004 motion, and that the other claims either had never been asserted or presented in the 1995 motion that had not been ruled on (doc.#15). The response concluded that the petition "is subject to being dismissed, either as a complete failure to exhaust or as mixed petition." The response then asserted that the unexhausted claims would be procedurally defaulted under *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). The response did not assert that the state courts' rejection of all but the ineffective assistance claim as successive constituted an independent and adequate state ground constituting a procedural default.

After petitioner filed his reply (doc.#16), a magistrate judge issued an order to show cause why the petition should not be dismissed as a mixed petition, finding Claims 1(a) and 2 to be exhausted and the other claims unexhausted. Alternatively, the order gave petitioner the option to voluntarily dismiss the unexhausted claims and proceed with the exhausted claims (doc.#17). The order contained no discussion concerning timeliness.[7]

Petitioner objected to the magistrate judge's finding of unexhaustion, but also moved to dismiss the unexhausted claims (doc.#18).

The district court overruled petitioner's objections, dismissed the unexhausted claims, and drew the remaining claims to a district judge and a magistrate judge (doc.#19). Like the magistrate judge's order, the district court's order noted in passing that the 1995 motion had not been ruled on.

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[7] In the statement of the case, the order acknowledged the filing of the 1995 motions and found that "the trial court apparently only ruled on the motion for appointment of counsel . . . ."

The district court ordered Respondents to file a full answer to the petition (doc.#21). With regard to timeliness, the answer stated: "As noted in the pre-answer response, the Respondents are not challenging, but do not concede, the timeliness of the petition. Respondents hereby incorporate the arguments raised in the pre-answer response into this answer" (doc.#22).

With regard to exhaustion, the answer stated that "[t]he Respondents incorporate by reference those arguments as to exhaustion made in the pre-answer response regarding claim 2" (*id.*). The answer also argued Claim 1(a) was procedurally defaulted because the state courts had rejected it on the independent and adequate state ground that it had not been raised on direct appeal (*id.*). The answer also maintained that the claims failed on the merits.

After obtaining the state court records (doc.#23,24), the district court issued an order denying the petition (doc.#25). The district court found that "[u]pon current briefing, it appears that claim 1(a) may be procedurally defaulted," but elected "in the interest of fairness to Mr. Wood, to address claim 1(a) on the merits." The court then rejected both claims on the merits (*id.*).

Petitioner appealed the district court's order, both as to exhaustion and merits determination. The Tenth Circuit directed Respondents to file a brief responding to petitioner's opening brief, which essentially reasserted the arguments made in its answer to the application.

After petitioner filed a reply, the Tenth Circuit granted a certificate of appealability on the two claims resolved on the merits. In addition, the Tenth Circuit recognized that petitioner's claims "may be subject to dismissal for various procedural reasons." Observing that petitioner's "apparently dilatory behavior [between 1995 and 2004] calls into question his eligibility for the tolling provision of §2244(d)(2) and his eligibility for equitable tolling," the Tenth Circuit indicated it would analyze the matter further and directed the parties to address timeliness.[8] The Tenth Circuit appointed counsel for petitioner and directed counsel to file a supplemental brief discussing the merits, timeliness, and procedural default.

With regard to timeliness, counsel's supplemental brief conceded "that the state court record . . . reflects no activity in Mr. Wood's case from the time the state court appointed counsel for Mr. Wood in December 1995 until August of 2004 when Mr. Wood filed his motion to vacate." Nevertheless, the brief asserted that because the 1995 motion was properly filed but never resolved, it remained pending during the entire eight-plus years of inactivity. The brief stated that equitable tolling was not an issue because the application was timely.

Respondent's answer brief maintained the 1995 motion was abandoned because petitioner failed to make reasonable efforts to secure a ruling, and no special circumstances existed to excuse petitioner's dilatoriness. Petitioner's reply brief asserted that not until December 2007 did a Colorado appellate court first recognize that a postconviction motion could be abandoned. Petitioner did not cite *Day*, or assert that respondents had deliberately waived the issue.

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[8] The Tenth Circuit also directed the parties to discuss whether Claim 1(a) was procedurally defaulted.

The Tenth Circuit ordered Respondents to file a copy of all state court postconviction dockets and records regarding the 1995 motion, finding that the record on appeal was silent as to what happened to the motion. Respondents responded that the state trial court had sent all documents to the federal habeas court and had no additional documents related to the 1995 motion.

In an unpublished order, the Tenth Circuit affirmed the district court's order, but on a different ground. The court first found that it had discretion to affirm on any ground adequately supported by the record. Next, it acknowledged this Court's admonition in *Day* that a federal court cannot override a State's deliberate waiver of a limitations defense and sua sponte dismiss a habeas petition, but found that Respondents had made no such waiver. The court characterized as cryptic Respondents' statement that they were not challenging — and simultaneously not conceding — timeliness, but concluded that "[w]hile the precise import of this quotation eludes us, we conclude it is not a deliberate waiver, given that it follows an argument as to why Wood's habeas petition would be untimely, and concludes with a refusal to concede that the petition is timely." The court noted that considering the timeliness issue is "particularly apt in this case, given that the issue was raised in the district court and addressed by Wood, the parties have briefed the issue on appeal, and the interests of justice would be served in reaching the timeliness issue given the extensive time period involved."

Turning to the substance of the issue, the Tenth Circuit looked to relevant state law in resolving the federal question of whether the 1995 motion was pending. The court found that Colorado's judge-made rule that a motion may be deemed abandoned if a defendant failed to secure an expeditious ruling "is consistent with 'Congress's intent to encourage exhaustion of state court remedies without allowing prisoners to toll the limitations period indefinitely.'" Slip op. at 7 (Quoting *Gibson v. Klinger*, 232 F.3d 799, 807 (10th Cir. 2000)). Next, quoting *Welch v. Carey*, 350 F.3d 1079, 1083 (9th Cir. 2003) (emphasis added), the court said that "Congress and the courts appropriately built slack into the process by providing a *reasonable* grace period for pending applications, not for open-ended and unjustified delay in pursuing claims and relief. Tolling accommodates effort, not inaction." Slip op. at 7.

Turning to the facts, the court found that petitioner made no attempt to communicate with the court for any reason over eight years. The court found it significant that on several occasions — in petitioner's 2004 application, his federal habeas petition, his response to the district court's order to show cause why his petition should not be dismissed as time barred, and his motion to reconsider the dismissal of his petition — petitioner never once mentioned his 1995 motion, but stated that *no* other postconviction proceedings had been filed prior to his 2004 application.

The court concluded that "[u]nder these unique circumstances, . . . Wood abandoned his 1995 motion before filing his 2004 petition." The court found it unnecessary to decide when the abandonment occurred, as the entire one-year limitation period had run, and "any break in the pendency of the 1995 motion after AEDPA's enactment renders Wood's 2008 federal habeas petition untimely." The court found that petitioner's position that the 1995 motion was still pending under these circumstances was inconsistent with Congress's intent in establishing a one-year limitations period.

Counsel for petitioner filed a petition for panel rehearing challenging the Tenth Circuit' determination that respondent's cryptic statement neither challenging nor conceding timeliness was not a deliberate waiver. Alternatively, counsel asked the court to remand the case for an evidentiary hearing on the issue of abandonment. Petitioner made no proffer concerning what evidence would be presented that the Tenth Circuit had not already considered.

REASONS WHY THE PETITION SHOULD BE DENIED

This case stands for the unremarkable proposition that an appellate court has discretion to affirm a district court's ruling on any ground adequately supported by the record The Tenth Circuit considered the entire context of respondents' pleading — not an isolated phrase as petitioner does — in determining that respondents had not deliberately waived a time bar defense. Then based on its review of the entire state court record, the Tenth Circuit properly concluded that petitioner's dilatory conduct and admissions in his pleadings demonstrated he had abandoned his 1995 motion. Review under these unique circumstances is unwarranted.

1. Certiorari is not appropriate to review the Tenth Circuit' proper exercise of its discretion to affirm the district court on a different ground adequately supported by the record.

This Court has recognized that a respondent in *this* Court may defend a judgment on any ground supported by the record, where the asserted grounds were raised below and fully briefed and argued in this Court. *Bennett v. Spear*, 520 U.S. 154, 166-67 (1997); *see also Ponte v. Real*, 471 U.S. 491, 500 & n.3 (1985) (recognizing that respondent was entitled to urge affirmance of state court judgment on a ground not adopted by that court, but rejecting the argument where the record was exceedingly thin and demonstrated confusion as to the proceedings below).

Here, the issue is not even whether *this* Court should consider timeliness for the first time, but whether the Tenth Circuit properly did so. Whereas this Court handpicks the cases it reviews, the circuit courts are decisional courts that must review all properly filed appeals. Where a court of appeals determines the interests of justice are served by affirming the district court's ruling on a different ground adequately supported by the record, and in the absence of a deliberate waiver of that ground, the court properly exercises its discretion to do so.

In *Day*, this Court held that a federal district court has discretion on its own initiative to dismiss a habeas petition as untimely where the State answered the petition without contesting its timeliness but without deliberately waiving the defense. 547 U.S. at 202. The same principle should permit a court of appeals in the interests of justice and in the exercise of its discretion to proceed in the same manner where the record adequately supports the alternative ground. This is nothing more than affirming the district court's ruling on a different ground.

Indeed, if an appellate court is not permitted to consider a procedural bar for the first time on appeal that is supported by the record and is dispositive of the case, the interests of justice would be thwarted in a case such as this where the application is obviously time barred. In creating the time limitation period, Congress intended to advance finality and prevent stale claims, and in so doing to protect the State's important interest in preserving a conviction. *See Mayle v. Felix*, 545 U.S. 644, 662 (2005).

Here, the obviousness of the application's untimeliness is well supported by the record that the Tenth Circuit had before it. First, the state district court has provided the entire record. Second, Wood's failure to assert the 1995 proceeding as a prior proceeding despite numerous opportunities starting in 2004 is strong evidence that he himself considered the motion abandoned. Third, Wood has never made any proffer concerning additional evidence he believes should be considered.[9]

Importantly, timeliness of petitioner's federal habeas application has been an issue since the inception of the case. The district court initially dismissed the case when petitioner failed to provide any basis for tolling. Moreover, respondents at their first opportunity raised the very argument of abandonment that the Tenth Circuit ultimately relied on. In light of a record that shows over eight years of inactivity and petitioner's repeated failures to acknowledge the 1995 motion, it was obviously a mistake for respondent not to affirmatively challenge timeliness. *Cf. Day*, 547 U.S. at 210 (district court properly considered timeliness sua sponte where the state's failure to assert time bar was an inadvertent error and not a deliberate waiver). If Respondents' response had been only that they were not challenging timeliness, the question of deliberate waiver would be closer. However, and as the Tenth Circuit reasonably concluded, the context of what the court charitably characterized as cryptic showed that the response was "not a deliberate waiver, given that it follows an argument as to why Wood's habeas petition would be untimely, and concludes with a refusal to concede that the petition is timely." Rather, the response demonstrates the haste in which the pleading was prepared in order to deal with an overloaded docket.

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[9] Of course, any such proffer for the first time in his certiorari reply brief would be wholly improper.

That respondents' treatment of the timeliness issue was a mistake and not a deliberate waiver is further demonstrated by respondents' failure to raise an obvious procedural bar. Wood's challenge to the validity of his jury trial waiver in his 2004 motion was based on the allegation that it had been made through counsel and not personally made by Wood. It was only in his state appellate reply brief that he first asserted that counsel's bad advice rendered the waiver invalid, the ground that made its way into his federal habeas application. Under Colorado law, this new allegation was not cognizable. *See People v. Czemerynski*, 786 P.2d 1100, 1107 (Colo. 1990) (Colorado Supreme Court would not consider issue raised for first time in reply brief).

Importantly, this was a new allegation and not merely supplemental evidence that petitioner presented for the first time in his appellate reply brief then in his habeas application. To exhaust a claim, an applicant must fairly present to the state courts every claim he subsequently presents on habeas. To do this, the applicant must present the same claim he urges upon the federal courts. *Picard v. Connor*, 404 U.S. 270, 276 (1971). This requires an applicant to present the same factual allegations, and not merely the same theory. *Id.; see also Anderson v. Harless*, 459 U.S. 4, 6 (1982) (§2254 requires federal habeas petitioner to provide state courts with fair opportunity to apply controlling legal principles to the facts bearing upon his constitutional claim).

The new factual allegation presented for the first time in his appellate reply brief fundamentally altered his claim. The claim that was fairly presented was that the jury trial waiver was not personal. As the state courts found, petitioner's signed waiver and docket entries rebutted this claim and rendered petitioner's factual allegation untrue. However, by challenging counsel's advice, he asserted a claim that involved evidence not in the record. To have such a claim considered, it was necessary to present the claim to the state trial court in the first instance to determine whether an evidentiary hearing was appropriate. As a result, Wood never fairly presented this claim in state court.

Notwithstanding this obvious anticipatory default under *Coleman*, *supra*, respondents mistakenly conceded that the jury trial waiver claim in his federal habeas claim was similar to the claim raised in his 2004 motion. This oversight further reflects the haste in which the pleadings were prepared to cope with a heavy caseload.

Further, it is not necessary for this Court to use this case to consider the boundaries of what constitutes a deliberate waiver. Respondents could find no appellate cases determining the factors that make a waiver deliberate. The dearth of cases is significant for at least two reasons.

First, it suggests that the issue has not often arisen. Second, it shows that the issue has not had sufficient time to percolate through the lower courts. "To identify rules that will endure, [this Court] must rely on the state and lower federal courts to debate and evaluate the different approaches to difficult and unresolved questions of constitutional law." *California v. Carney*, 471 U.S. 386, 400 (1985). "Deliberation on the question over time winnows out the unnecessary and discordant elements of doctrine and preserves 'whatever is pure and sound and fine.'" *Id.* at 400-01 (quoting B. Cardozo, *The Nature of the Judicial Process* 179 (1921)). Determining the factors that make a waiver deliberate is better left to the lower courts before this Court intervenes.

Petitioner asserts "the circuit's decision in *Wood* that *Day* permits an appellate court to raise a timeliness defense *sua sponte* for the first time on appeal conflicts with the only other circuit to have decided the issue," citing *Sasser v. Norris*, 553 F.3d 1121, 1128 (5th Cir. 2009), and *Barnett v. Roper*, 541 F.3d 804, 808 (5th Cir. 2008). For several reasons this assertion is unavailing.

First, the Tenth Circuit did *not* rely on *Day* to raise a timeliness defense sua sponte for the first time on appeal. Rather, the court simply exercised its discretion to affirm the district court on a different ground. The court relied on *Day* only to the extent of determining that respondents had not deliberately waived the defense.

The crux of the issue before this Court is one relating to the amount of discretion a particular circuit elects to take. By definition, discretion means the authority to make one choice to the exclusion of another. If a particular circuit chooses to limit its discretion, that is a matter that is more appropriately left to the circuits and not a matter requiring this Court's intervention. Because the question involves the independent judgment of the appellate court, a bright-line rule limiting that independence and discretion would not be desirable.

Second, although the Tenth Circuit's procedure for dealing with grounds not employed by the district court may differ from two other circuits, the panel's opinion created no split for the simple reason that it is unpublished. It reflects the opinion of a single panel in the circuit, and does not speak for the Tenth Circuit as a whole. Thus, it does not create a split between circuits.

Third, *Sasser* and *Norris* are distinguishable. In both cases, the respondent raised the issue for the first time on appeal. Here, the issue was raised in the district court, first by the court itself, then by respondents. Importantly, the district court did not characterize respondent's "cryptic" comment as a deliberate waiver. Given the ambiguity of respondents' "not challenging/not conceding comment," the district court probably should have inquired further into whether respondents were waiving the issue. *See Day, supra.* Indeed, respondents' raising of the issue in their initial pleading no doubt prompted the Tenth Circuit to request briefing by the parties.

Fourth, whether to address an issue sua sponte is fact specific, as it necessarily depends on the adequacy of the record before the court. Here, and as found by the Tenth Circuit, the facts are particularly unique. As such, this case involves a situation that is unlikely to arise often.

2. Revisiting *Day's* rejection of an inflexible rule of forfeiture is premature.

Wood asks this court to extend to federal habeas cases the principle set forth in *Kontrick v. Ryan*, 540 U.S. 443 (2004), and *Eberhart v. United States*, 546 U.S. 12 (2006), that statutory limitations defenses are forfeited if not raised before the district court rules on the merits of a claim. The short answer is that this Court rejected such an approach in *Day*.

There, the petitioner took the position consistent with *Kontrick* that a defendant forfeits a statute of limitations defense not asserted in its answer. In lieu of such an inflexible rule, the State advocated for an intermediate approach to permit the court to exercise discretion in each case in the interests of justice. This Court agreed with the State, and held "that district courts are permitted, but not obliged, to consider, *sua sponte*, the timeliness of a state prisoner's habeas petition." *Day*, 547 U.S. at 207-09.

As argued above, there is no principled reason to deprive a court of appeals of the same discretion that a district court is authorized to exercise where the record supports the appellate court's decision. And as barely five years have elapsed since *Day*, the issue is not postured for this Court to revisit.

CONCLUSION

Nothing about this case warrants review. The Tenth Circuit properly exercised its discretion in electing to affirm the district court on a different ground. The court's decision was particularly appropriate given that the record on appeal included the complete state court record. To the extent petitioner seeks to revisit *Day*, the timing of his request is as premature as his application was untimely. This Court should deny the petition.

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CERTIFICATE OF SERVICE

I certify that on this 6th day of July 2011, I served the foregoing upon counsel for petitioner herein by depositing copies of same in the United States mail, postage prepaid, at Denver, Colorado, addressed as follows:

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JOINT APPENDIX

Supreme Court, U.S.
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No. 10-9995

IN THE

Supreme Court of the United States

PATRICK WOOD,

Petitioner,

v.

KEVIN MILYARD, WARDEN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOINT APPENDIX

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APPENDIX N — District Court Order Denying 28 U.S.C. § 2254 Application, Filed July 6, 2009 . . . . 96a

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APPENDIX O — Tenth Circuit Order Granting Certificate of Appealability, Filed January 4, 2010 . . . . 112a

APPENDIX P — Tenth Circuit Order Directing the State to File a Copy of all State Court Postconviction Dockets and Records Regarding Wood's 1995 Postconviction Motion, Filed November 3, 2010 . . . . 131a

APPENDIX Q — State's Response to Tenth Circuit Order Directing the State to File a Copy of all State Court Postconviction Dockets and Records Regarding Wood's 1995 Postconviction Motion, Filed November 4, 2010 . . . . 133a

APPENDIX R — Order and Judgment of the United States Court of Appeals for the Tenth Circuit, Filed November 26, 2010 . . . . 135a

APPENDIX A — Relevant Docket Entries

Tenth Circuit Court of Appeals
Appeal from: United States District Court for the District of Colorado

Court of Appeals Docket #: 09-1348

Wood v. Milyard, et al

08/10/2009	[9682991] Prisoner case docketed. DATE RECEIVED: 08/07/2009. Certificate of appealability due 09/09/2009 for Patrick Wood. Notice of appearance due on 08/24/2009 for Kevin Milyard and The Attorney General of the State of Colorado, and Notice of appearance due on 09/09/2009 for Patrick Wood. Fee or ifp forms due 09/09/2009 for Patrick Wood.
10/19/2009	[9703649] Appellant's application filed by Patrick Wood for issuance of certificate of appealability. Served on 10/19/2009. Manner of Service: hand delivery.
10/19/2009	[9703650] Appellant's opening brief filed by Patrick Wood. Original and 2 copies. Served on 10/19/2009 by US mail. Oral argument requested? n.
11/25/2009	[9714548] Order filed by Clerk of the Court (DEC) Appellee brief now due 12/11/2009 for Kevin Milyard. Served on 11/25/2009.

12/08/2009	[9717732] Response filed by Attorney General of the State of Colorado and Mr. Kevin Milyard to Petitioner's Brief and Request for a Certificate of Appealability. Served on 12/08/2009. Manner of Service: US mail .--[Edited to remove PDF 12/22/2009 by SLS. The response brief was cited as deficient on 12/15/2009. A corrected brief was filed on 12/21/2009.] PRV
12/30/2009	[9724024] Appellant's reply brief filed by Patrick Wood. Original and 7 copies. Served on 12/28/2009. Manner of Service: US mail.
01/04/2010	[9724950] Order filed by Judge Tymkovich granting Appellant's motion for a certificate of appealability. The office of the Federal Public Defender for the District of Colorado is appointed to represent Appellant. Notice of appearance due 1/19/10 for Patrick Wood. Counsel for appellant shall file a supplemental opening brief. Appellant's brief due on 03/05/2010 for Patrick Wood. New counsel may borrow the hard copy of the record on appeal maintained in the clerk's office. In addition, the record is available electronically on the court's docket. Served on 01/04/2010.

05/05/2010	[9760223] Appellant's supplemental brief filed by Patrick Wood. Original and 7 copies. Served on 05/05/2010. Manner of Service: ECF/NDA. –[Edited 05/07/2010 by GH to add PDF with corrected brief] KAL
07/26/2010	[9782429] Appellee/Respondent's supplemental brief filed by Attorney General of the State of Colorado and Mr. Kevin Milyard. Original and 7 copies. Served on 07/26/2010. Manner of Service: email, US mail. PRV
09/09/2010	[9795991] Appellant's reply brief filed by Patrick Wood. Original and 7 copies. Served on 09/09/2010. Manner of Service: ECF/NDA –[Edited 09/09/2010 by AO to correct type of brief filed.] KAL
11/03/2010	[9812290] Order filed by Clerk of the Court, respondents/appellees shall obtain and file in this court, within 30 days of the date of this order, a copy of all state court postconviction dockets and records regarding Wood's 1995 motion. Response due on 12/03/2010 for Kevin Milyard and The Attorney General of the State of Colorado. Served on 11/03/2010.

11/04/2010	[9812433] Response filed by Mr. Kevin Milyard and The Attorney General of the State of Colorado to Order dated 11/3/10. Served on 11/04/2010. Manner of Service: email. PRV
11/26/2010	[9818598] Affirmed; Terminated on the merits after submissions without oral hearing; Written, signed, unpublished. Judges Hartz, Porfilio and Brorby, authoring judge. Mandate to issue.
01/03/2011	[9828598] Petition for rehearing filed by Patrick Wood. Original and 7 copies. Served on 01/03/2010. Manner of Service: ECF/NDA. --[Edited 01/05/2011 by GH to replace PDF with version correcting typos] KAL
01/07/2011	[9829891] Order filed by Judges Hartz, Porfilio and Brorby denying petition for rehearing filed by Appellant Patrick Wood.
04/19/2011	[9859312] Petition for writ of certiorari filed by Patrick Wood on 04/07/2011. Supreme Court Number 10-9995.
10/04/2011	[9907789] Supreme court order dated 09/27/2011 granting certiorari filed.

U.S. District Court
District of Colorado (Denver)

CIVIL DOCKET FOR CASE #: 1:08-cv-00247-WYD

Wood v. Milyard et al

02/05/2008	1	Application (PETITION) for Writ of Habeas Corpus (Filing fee $5, Receipt Number COX007513), filed by Patrick Wood. (Attachments: # 1 Receipt) (llk,) (Entered: 02/06/2008)
02/19/2008	2	ORDER TO SHOW CAUSE: returnable by Mr. Wood to show cause in writing why the habeas corpus application should not be denied. Show Cause response is due within 30 days. Signed by Magistrate Judge Boyd N. Boland on 2/19/08. (pap,) (Entered: 02/20/2008)
03/20/2008	4	RESPONSE TO ORDER TO SHOW CAUSE re 2 by Petitioner Patrick Wood. (pap,) Modified on 3/21/2008 to Correct file date. (pap,). (Entered: 03/21/2008)
04/03/2008	5	ORDER of Dismissal. Order granting 3 Motion for Extension of Time to File a Response to the Show-Cause order that Applicant, Patrick Wood, submitted to the Court 03/21/08. Ordered that the habeas corpus application is denied

		as barred by the one-year limitation. Signed by Judge Zita L. Weinshienk on 04/03/08.(jjh,) (Entered: 04/03/2008)
04/21/2008	9	MOTION for Reconsideration by Petitioner Patrick Wood. (jjh,) (Entered: 04/22/2008)
05/22/2008	11	ORDER granting 9 Motion for Reconsideration. Signed by Judge Zita L. Weinshienk on 05/21/08.(jjh,) (Entered: 05/23/2008)
05/29/2008	12	ORDER to File Pre-Answer Response. Ordered that within 20 days Respondents shall file a Pre-Answer Response. Ordered that within 20 days of the filing of the Pre-Answer Response Applicant may file a Reply. Signed by Magistrate Judge Boyd N. Boland on 05/28/08. (jjh,) (Entered: 05/29/2008)
06/17/2008	15	RESPONSE to 12 Order, by Respondents Kevin Milyard, Colorado Attorney General. (Attachments: # 1 Appendix A, # 2 Appendix B, # 3 Appendix C, # 4 Appendix D, # 5 Appendix E, # 6 Appendix F, # 7 Appendix G, # 8 Appendix H, # 9 Appendix I, # 10 Appendix J, # 11 Appendix K, # 12 Appendix L)(Van Horn, Patricia) (Entered: 06/17/2008)

07/07/2008	16	REPLY to 15 Pre-Answer Response, by Petitioner Patrick Wood. (jjh,) (Entered: 07/07/2008)
08/15/2008	17	ORDER TO SHOW CAUSE: Ordered that Applicant, Patrick Wood, show cause within 30 days from the date of this Order why the habeas corpus application should not be denied as a mixed petition. Signed by Magistrate Judge Craig B Shaffer on 08/14/08. (jjh,) Modified on 8/19/2008 to correct spelling error (jjh,). (Entered: 08/15/2008)
09/15/2008	18	OBJECTION to 17 to Finding of Unexhausted Claims, and Motion to Dismiss Voluntary Claims Deemed Unexhausted and to Proceed on Exhausted Claims by Petitioner Patrick Wood. (jjh,) (Entered: 09/15/2008)
09/22/2008	19	ORDER to Overrule Objection, Dismiss in Part, and Draw Remaining Claims to a District Judge and to a Magistrate Judge. The "Objection to Finding of Unexhausted Claims Deemed Unexhausted and to Proceed on Exhausted Claims" is GRANTED. The unexhausted claims 1(b), 3,4, and 5 are dismissed. Applicant is allowed to proceed only on exhausted claims 1 (a) and 2. The remaining claims 1 (a)

		and (2) and the action are drawn to a district judge and to a magistrate judge. Signed by Judge Zita L. Weinshienk on 09/22/2008. (sah,) (Entered: 09/23/2008)
10/02/2008	21	ORDER TO ANSWER: directed to Respondents. Answer due by 10/31/2008. Signed by Judge Wiley Y. Daniel on 10/2/08. (pap,) (Entered: 10/02/2008)
10/30/2008	22	ANSWER to 1 Petition for Writ of Habeas Corpus by Kevin Milyard, Colorado Attorney General. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Deposition Excerpts H, # 9 Exhibit I, # 10 Exhibit J, # 11 Exhibit K, # 12 Exhibit L, # 13 Exhibit M)(Van Horn, Patricia) (Entered: 10/30/2008)
04/14/2009	23	ORDER for State Court Records. IT IS ORDERED that, on or before Monday, April 20, 2009, the respondents shall provide me with the record from the state trial court. by Chief Judge Wiley Y. Daniel on 4/14/09. (erv,) (Entered: 04/14/2009)
04/20/2009	24	STATE COURT RECORDS from Adams County District Court by Respondents Kevin Milyard, Colorado Attorney

		General. (1 Volume of Trial Court Record in Paper format, Volumes 2-6 on CD, placed in an expanadable folder and placed in oversized documents) (erv,) (Entered: 04/20/2009)
07/06/2009	25	ORDER re: 1 Application for Writ of Habeas Corpus filed by Patrick Wood. For the reasons stated, the habeas corpus relief will be denied. Accordingly, it is ORDERED that the remaining claims 1(a) and (2) are dismissed as meritless, the habeas corpus application is denied, and the action is DISMISSED WITH PREJUDICE. It is FURTHER ORDERED that each party shall bear his own costs and attorneys fees. by Chief Judge Wiley Y. Daniel on 7/6/09. (erv,) (Entered: 07/06/2009)
07/06/2009	26	JUDGMENT by Clerk in favor of Colorado Attorney General, Kevin Milyard against Patrick Wood re: 25 Order, the habeas corpus application is denied, and the action is dismissed with prejudice. by Chief Judge Wiley Y. Daniel on 7/6/09. (erv,) (Entered: 07/06/2009)
08/05/2009	27	Application for Certificate of Appealability which is being treated as a NOTICE OF APPEAL as to 25 Order,

		26 Clerk's Judgment by Petitioner Patrick Wood. Fee Status: Pro se; Fee not paid; COA Pending. Notice mailed to all counsel on 08/07/09. (bjrsl,) (Entered: 08/07/2009)
08/11/2009	31	CERTIFICATE OF APPEALABILITY DENIED re 27 Notice of Appeal filed by Patrick Wood, by Chief Judge Wiley Y. Daniel on 08/11/09. (bjrsl,) (Entered: 08/11/2009)

Colorado District & County Courts
CO District & County - Adams

1986CR000123

People of The State of Colorado v. Wood, Patrick K

06/29/1995	MOTN	Motion To Vacate Judg of Conviction & Sentence & M/For Apptmt of Counsel Fr/Def
10/30/1995	MOTN	Motion To Req A Ruling on Previously Filed Motn's /Alj
12/01/1995	MISC	Miscellaneous Order For Appointment of Counsel /Dlf

03/08/1996	ORDR	Order From US District Court Dated 3-21-95: Petn For Writ Of Habeas Corpus Denied
04/07/2004	LETR	Letter DEF/ Wood, Patrick K From Def /Jlb
08/30/2004	PETN	Petition DEF/ Wood, Patrick K For Postconviction Relief Pursuant to Crim.P.35(C) /Slg
09/02/2004	PETN	Petition DEF/ Wood, Patrick K For Postconviction Relief Pusruant to Crim.P.35(C) Finacial Affidavit /Slg
09/03/2004	MINC	Minute Order (Print) Order; Deft's Pro Se Motn For Postconviction Relief 35(C) Csc/Rdh/Otr The CT Denies The Deft's Motn as to Any Challenge to His Conviction on The 2nd Degree Murder Conviction Because it Was Untimely Filed The Deft Has Not Asserted Any Grounds Which Would Establish an Exception to Postconvicion Relief. The CT Denies The Relif Sought by The Deft W/Out Hrng. The CT Finds Deft's Written Waiver of Right to Jury Trial And Order Was Filed. The CT Finds And Records Show to The Satisfaction of The

		CT That The Factual Allegation Made by The Deft Is Untru And The Def't Mont For Reliefe Based on This Ground is Denied W/Out Hrng. CT Denies The Deft's Motn For Appointment of Counsel at State Expense as Moot Cc Deft Da /Rdh
10/07/2004	MOTN	Motion DEF/ Wood, Patrick K To Re-Examine Def's Petn For Postconviction /Am
10/21/2004	MORD	Motion and Order Denying Def's Motion to Re-Examine Petition For Post-Conviction Relief. See Long Order in File. Cc: Def Da /Bei
02/08/2007	ORDR	Order From Supreme Court Petition For Writ of Certiorari is Denied /Pad

APPENDIX B — Application For A Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 in the United States District Court for The District of Colorado, Filed February 5, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. '08-CV-00247
(To be supplied by the court)

PATRICK WOOD, Applicant,

v.

KEVIN MILYARD, Warden, Sterling
Correctional Facility, Respondent,
(Name of warden, superintendent, jailer, or other custodian)

and

The Attorney General
of the State of: COLORADO, Additional Respondent.

(Note: If you are attacking a judgment that imposed a sentence to be served in the future, you must fill in the name of the state where the judgment was entered. If you have a sentence to be served in the future pursuant to the judgment of a federal court, you should file a motion pursuant to 28 U.S.C. § 2255 in the federal court that entered the judgment.)

APPLICATION FOR A WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2254

Appendix B

A. CONVICTION UNDER ATTACK

1. Name and location of the court that entered the judgment of conviction you are attacking:	Adams County District Court 1100 Judicial Center Dr. Brighton, CO 80601
2. Date the judgment of conviction was entered:	January 21, 1987
3. Case number:	86CR123
4. Describe the type and length of sentence imposed:	Class I, 40 years to Life sentence, plus 8 years (concurrent)
5. Are you serving a sentence that was imposed for a conviction other than the conviction you are attacking in this application?	____Yes __x__ No (CHECK ONE)
6. Nature of the offenses with which you were charged: (all counts)	1st Degree Murder After Deliberation, 1st Degree Felony Murder, Aggravated Robbery, and two counts of Felony Menacing

7. On which counts were you convicted?	**2nd Degree Murder, 1st Degree Felony Murder, Attempt to Commit Aggravated Robbery, and two counts Felony Menacing**
8. What was your plea?	Not Guilty
9. If you pled guilty pursuant to a plea bargain, describe the terms and conditions of the plea:	N/A
10. Kind of trial:	____ Jury __x__ Judge only (CHECK ONE)
11. Did you testify at trial?	__x__ Yes ____ No (CHECK ONE)

B. DIRECT APPEAL

1. Did you file a direct appeal?	__x__ Yes ____ No (CHECK ONE)
2. Name and location of the court in which the direct appeal was filed:	Colorado Court of Appeals 2 East 14th Avenue, Suite 300 Denver, CO 80203

3.	Date and result of direct appeal (attach a copy of the decision if available):	Judgment affirmed on May 4, 1989.
4.	Did you seek review in the state's highest court on direct appeal?	__x__ Yes ____ No (CHECK ONE)
5.	Date and result of review in state's highest court (attach a copy of the decision if available):	Petition for Writ of Certiorari denied on October 23, 1989.
6.	List the claims raised on direct appeal:	

The trial court erred in failing to suppress defendant's statements to police since:

1. Defendant requested to call his family prior to making a formal statement, and request was denied;

2. Public Defender Office representatives attempted to see Defendant before he made a formal statement, and were denied access.

7. Were all claims raised on direct appeal presented to the state's highest court? _x_ Yes ____ No (CHECK ONE)

8. If you did not file a direct appeal or if you did not present all of your claims to the state's highest court, explain why: ______________________

C. POSTCONVICTION PROCEEDINGS

1. Other than a direct appeal, have you initiated any postconviction proceedings with respect to the judgment under attack in any state or federal court? _x_ Yes ____ No (CHECK ONE)

2. If you answered "Yes" to question 1., give the following information for each postconviction proceeding. If you have initiated more than one postconviction proceeding, use extra paper to list each proceeding using the format below.

   A. Name and location of court:

   Adams County District Court
   1100 Judicial Center Dr.
   Brighton, CO 80601

B. Type of proceeding: Rule 35C Petition for Post Conviction Relief/ Appeal

C. Date filed: August 19, 2004

D. List the claims raised:

1. That conviction was obtained and sentence was imposed in violation of the U.S. Constitution, laws of the United States, Colorado Constitution, or Colorado law;

2. That conviction was obtained under a statute that violates the U.S. Constitution or the Colorado Constitution;

3. Any grounds otherwise properly the basis for collateral attack upon a criminal judgment.

E. Date and result (attach a copy of the decision if available): September 3, 2004

F. Did you appeal? x Yes ____ No (CHECK ONE)

G. Date and result on appeal (attach a copy of the decision if available):	August 3, 2006
H. Did you appeal to the state's highest court?	__x__ Yes ____ No (CHECK ONE)
I. Date and result of appeal to highest state court (attach a copy of the decision if available):	Petition for Writ of Certiorari denied on February 5, 2007.

D. CLAIMS

CAUTION: To proceed in federal court, you ordinarily must exhaust the remedies available to you in the state courts for each claim asserted in this action. If you fail to assert all your claims in this application, you may be barred from presenting additional claims at a later date. State concisely every claim that you wish to assert in this action. For each claim, specify the right that allegedly has been violated and state all supporting facts that you consider important. You do not need to cite specific cases to support your claim(s). If you need additional space to describe any claim or to assert additional claims, use extra paper to continue the claim or to assert the additional claims. Identify clearly any additional pages that you attach to this form.

Appendix B

1. Have you fairly presented
to the state's highest court
each of the claims asserted
in this action?
_x_ Yes ____ No (CHECK ONE)

2. If you answered "No" to question 1., list the claims that have not been fairly presented to the state's highest court and explain why: ________________
____
____
____

3. Claim One: Convictions were obtained by violation of protection against Double Jeopardy.

A. Supporting facts:

Petitioner was convicted of both 1st Degree Felony Murder, and 2nd Degree Felony Murder and Aggravated Robbery, which violates principles of Double Jeopardy, and resulted in conviction of two separate murder counts for a single victim, and in being twice convicted for Aggravated Robbery, as an underlying felony for the Felony Murder count and separately as its own charge.

Further, after a jury trial, Petitioner had already been found guilty of the charge of Aggravated Robbery, then when the jury was unable to reach a decision on the murder counts, resulting in a mistrial, a second trial was conducted before the trial judge only. The jury's conviction of the Aggravated Robbery count, under the Implied Acquittal Doctrine, should have prohibited the trial judge's subsequent consideration and conviction for 1st Degree Murder under the Felony Murder Rule.

B. If this claim was not raised on direct appeal or in one of the state postconviction proceedings already described above, explain how you have exhausted state court remedies for this claim:

4. Claim Two: Conviction was obtained by involuntary waiver of right to jury trial.

A. Supporting Facts:

The first trial was conducted before a jury. The jury found Petitioner guilty of the Aggravated Robbery and Felony Menacing counts, but was unable to reach a decision on the murder counts, which resulted in a mistrial. The prosecution offered to drop the death penalty in exchange for waiving the right to have a second trial by jury and agree to a second trial before the trial judge instead. Counsel advised Petitioner to do so, without adequately informing him of his options or of the consequences of the waiver. Specifically, counsel did not advise him that under the circumstances of his case and the history of the death penalty in Colorado, it was highly unlikely that his case would result in a death sentence if going before a second jury. Counsel also failed to advise him that a hearing before the trial judge could only result in a conviction for 1st degree felony murder. In fact, counsel advised him to the contrary and advised him that the trial judge would be lenient with him based upon counsel's personal friendship with the judge and that a trial by judge would result in a better outcome for Petitioner. The advice did not present an accurate picture of what his options were, was not based on the law, and completely misstated the consequences of waiving his right to jury trial, therefore the waiver was not knowingly and voluntarily made, with an understanding of the consequences of the waiver. Further, the trial judge erred in accepting the waiver without questioning Petitioner thoroughly about it to ensure it was knowingly and voluntarily made.

B. If this claim was not raised on direct appeal or in one of the state postconviction proceedings already described above, explain how you have exhausted state court remedies for this claim:

5. Claim Three: Conviction was obtained by a violation of the privilege against self incrimination.

A. Supporting facts:

Counsel advised Petitioner to testify against himself at the second trial before the judge, without informing him of the consequences, for the purposes of "throwing himself on the mercy of the court," and advised him that if he did so, the judge could and would be more lenient with him. Counsel failed to advise him that doing this, in the context of the felony murder statute, and in the context of an existing jury verdict

finding him guilty of Aggravated Robbery, which the prosecution was asserting as the underlying felony, would completely relieve the prosecution of the burden of proving the charges beyond a reasonable doubt. Counsel also failed to advise him that the judge would be more lenient on him if he did so, and did not advise him that it would only serve to harm his case, since felony murder does not require any evidence of intent as to the murder itself, but just to the underlying felony, which was not at issue at the second trial. In this context, there was nothing to be gained by testifying against himself, and much to lose. While this may have helped in refuting premeditation, at the same time, it practically ensured conviction under the felony murder rule, where conviction under either theory carried the same penalty.

B. If this claim was not raised on direct appeal or in one of the state postconviction proceedings already described above, explain how you have exhausted state court remedies for this claim:

SEE PAGES 6a AND 6b FOR ADDITIONAL CLAIMS FOUR AND FIVE.

6. Claim Four: Conviction was obtained as a result of denial of effective assistance of counsel.

A. Supporting facts:

Counsel was ineffective in advising Petitioner to waive his right to a second jury trial and to waive his right against self incrimination, in failing to advocate on

Petitioner's behalf and negotiate with the prosecution for a just result, in failing to either move for the 1st Degree Felony Murder to be striken from the trial judge's consideration at the second trial based upon the jury's finding of guilt on the separate offense of Aggravated Robbery at the first trial or at least in the alternative in failing to accurately relay the implications of the felony murder statute to Petitioner as it related to the waiver of his rights and decisions on how to proceed, in failing to identify obvious and key issues on direct appeal, such as having two convictions for murder for the same victim, and in having Aggravated Robbery counted twice against him, and in essence wasting his direct appeal on issues that would not have made a difference even if the appeal was successful. These errors had a direct and substantial impact on the outcome of his case, both at the trial level and on appeal, and the outcome of either one would have been different if not for counsel's ineffective assistance.

B. If this claim was not raised on direct appeal or in one of the state postconviction proceedings already described above, explain how you have exhausted state court remedies for this claim:

7. Claim Five: Colorado's 1st Degree Felony Murder statute is unconstitutional, both facially and as applied in this case.

A. Supporting facts:

The Colorado felony murder statute states that certain felonies, when combined with the death of an individual in the course of or in furtherance of the felony, qualifies as first degree murder. Since there are no requirements as to intent to commit the murder, there is no distinction between a conviction for first degree murder under the felony murder rule, and conviction for second degree murder and the underlying felony.

The felony murder rule is also unconstitutional since it disproportionately imposes the same punishment on one who commits a murder with premeditation after deliberation, as on one who has no intent to kill whatsoever and accidentally does so during the course of a felony. This violates equal protection principles, in that it circumvents an important distinction that has been part of the common law since its inception, which is intent. It is clear that our criminal justice system is designed to punish those that commit crimes after deliberation and with premeditation, more harshly than those that do not. The felony murder rule removes this significant distinction in the most severely punished crime in our criminal justice system, which is murder.

Application of the felony murder rule in this case is unconstitutional since the trial judge stated he felt this was clearly a case of second degree murder, yet in spite of this statement, the judge appeared to feel he was bound by law to find him guilty of first degree murder under the felony murder rule. This result occurred by removing the determination of the level of culpability, which should be within the province of the factfinder.

B. If this claim was not raised on direct appeal or in one of the state postconviction proceedings already described above, explain how you have exhausted state court remedies for this claim:

E. PRIOR APPLICATIONS

1. Other than the instant action, have you filed any action in federal court challenging the conviction under attack in this action? ____ Yes __x__ No (CHECK ONE)

* * *

F. OTHER CONVICTIONS

1. Do you have any concurrent or future sentence(s) to be served after you complete the sentence imposed as a result of the conviction under attack? ____ Yes __x__ No (CHECK ONE)

* * *

G. LEGAL REPRESENTATION

1. List the names and address, if known, of each attorney who has represented you in proceedings regarding the conviction under attack:

A. Preliminary hearing:	Craig L. Truman, P.C. #5331 1444 Wazee #205 Denver, CO 80202
B. Arraignment and plea:	Same as above.
C. Trial	Same as above.
D. Sentencing	Same as above.
E. Appeal:	Same as above.
F. Postconviction proceedings:	Pro se
G. Appeal from any adverse ruling in postconviction proceedings:	Pro se

H. REQUEST FOR RELIEF

I request the following relief:

Petitioner requests that the duplicate murder conviction and life sentence for 1st Degree Felony Murder be vacated, that this case be remanded, and that Petitioner be resentenced within the appropriate range for the remaining 2nd Degree Murder and Aggravated Robbery convictions.

DECLARATION UNDER PENALTY OF PERJURY

I declare under penalty of perjury that I am the applicant in this action, that I have read this application, and that the information in this application is true and correct. *See* 28 U.S.C. § 1746; 18 U.S.C. § 1621.

Executed on February 1, 2008
(Date)

/s/
(Applicant's Original Signature)

Applicant's prisoner identification number and complete mailing address:

Patrick Wood, DOC #56182, Sterling Correctional
Facility, P.O. Box 6000, Sterling, CO 80751

Respondents' names and complete mailing addresses:

Kevin Milyard, Warden, Sterling Correctional Facility,
12101 Hwy 61, P.O. Box 6000, Sterling, CO 80751

John W. Suthers, Attorney General, State of Colorado,
1525 Sherman St., Denver, CO 80203

APPENDIX C — District Court Order Directing Wood to Show Cause Why the Application Should Not Be Dismissed As Time-Barred, Filed February 19, 2008

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 08-cv-00247-BNB

PATRICK WOOD,

Applicant,

v.

KEVIN MILYARD, Warden, Sterling Correctional Facility, and THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents.

ORDER DIRECTING APPLICANT TO SHOW CAUSE

Applicant, Patrick Wood, is a prisoner in the custody of the Colorado Department of Corrections (DOC) who currently is incarcerated at the Sterling, Colorado, correctional facility. Mr. Wood filed *pro se* an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (2006). He has paid the $5.00 filing fee.

The Court must construe the habeas corpus application liberally because Mr. Wood is representing himself. ***See Haines v. Kerner***, 404 U.S. 519, 520-21 (1972); ***Hall v. Bellmon***, 935 F.2d 1106, 1110 (10th Cir. 1991). However, the Court should not be the ***pro se*** litigant's advocate. ***See Hall***, 935 F.2d at 1110. For the reasons stated below, Mr. Wood will be ordered to show cause why the application should not be denied as time-barred under 28 U.S.C. § 2244(d) (2006).

Mr. Wood alleges that he was convicted in Adams County District Court Criminal Action No. 86CR123 on charges of second-degree murder, first-degree felony murder, attempt to commit aggravated robbery, and felony menacing. The trial court sentenced him to the DOC for forty years to life. He alleges that on October 21, 1980, the judgment of conviction was entered. On May 4, 1989, his convictions were affirmed on direct appeal. On October 23, 1989, certiorari review was denied.

He alleges that on August 19, 2004, he filed a postconviction motion pursuant to Rule 35(c) of the Colorado Rules of Criminal Procedure, which the trial court denied on September 3, 2004. On August 3, 2006, the Colorado Court of Appeals affirmed. On February 5, 2007, certiorari review was denied. Mr. Wood asserts five claims. He alleges that he has presented each claim fairly to the state's highest court.

It appears that the application may be denied as time-barred. Pursuant to 28 U.S.C. § 2244(d) (2006), a one-year limitation period applies to the instant action. Section 2244(d) specifically provides as follows:

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of–

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment

> or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d).

The Court first must determine when the one-year limitation period began to run. Mr. Wood alleges that on October 23, 1989, certiorari review was denied on direct appeal. Mr. Wood's conviction and sentence became final prior to April 24, 1996, the date the one-year limitation period in 28 U.S.C. § 2244(d) was enacted into law. Therefore, in the absence of any reason to toll the limitations period, Mr. Wood should have initiated this action prior to April 24, 1997, one year after the statute's effective date. ***See United States v. Simmonds***, 111 F.3d 737, 746 (10th Cir. 1997). The instant action was submitted to the Court on February 5, 2008, well beyond the one-year limitation period.

Applicant filed his postconviction proceeding on August 19, 2004, over seven years after the one-year limitations period expired. Therefore, the postconviction proceeding did not toll the one-year limitations period, and this action appears to be time-barred. Applicant will be ordered to show cause why the application should not be denied as time-barred. In his response, Mr. Wood should provide any information that might be relevant to the one-year limitation period, including information relevant to the possibility of equitable tolling. Accordingly, it is

ORDERED that Mr. Wood show cause in writing within thirty (30) days from the date of this order why the habeas corpus application should not be denied as barred by the one-year limitation period in 28 U.S.C. § 2244(d). It is

FURTHER ORDERED that if Mr. Wood fails to show cause to the Court's satisfaction within the time allowed, the habeas corpus application will be denied and the action will be dismissed without further notice.

DATED February 19, 2008, at Denver, Colorado.

BY THE COURT:

/s/
Boyd N. Boland
United States Magistrate Judge

APPENDIX D — Excerpt From Wood's Response to Order to Show Cause, Filed March 20, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 08-cv-00247-BNB

PATRICK WOOD,

Applicant,

v.

KEVIN MILYARD, Warden, Sterling Correctional Facility, and **THE ATTORNEY GENERAL OF THE STATE OF COLORADO,**

Respondents.

RESPONSE TO ORDER DIRECTING APPLICANT TO SHOW CAUSE

COMES NOW, Patrick Wood, the Petitioner, in response to this Court's Order to Show Cause why this Court should hear his Petition for Habeas Corpus, and not hold him procedurally barred.

INTRODUCTION

The Petitioner notes at the outset, that the exhaustion principle is not a jurisdictional prerequisite, and the Court is not required to raise the issue of procedural bar sua sponte. See: Clayton v. Gibson, 196 F.3d 119 (10th Cir. 1999) (Exhaustion is not jurisdictional), and also, Trest v. Cain, 118 S.Ct. (1997) (The Federal court is under no obligation to raise procedural bar issues sua sponte).

Additionally, a habeas corpus court should not deny a petition solely on the basis that a claim was not brought upon direct appeal, and is thus, procedurally barred in the lower courts. Kaufman v. U.S., 394 U.S. 217, 89 S.Ct. 1068, 22 L.Ed 2d 227 (1969). If a petitioner has unexhausted claims, and an attempt to exhaust would be futile, then exhaustion may be avoided by the petitioner. Clayton v. Gibson, supra.

This Petitioner is proceeding pro se, and his petition should be construed liberally. See: Urbina v. Thomas, 270 F.3d 292 (6th Cir. 2001) ("Federal courts should construe a habeas corpus petition filed by a pro se litigant more liberally than one filed by an attorney."), also: Clark v. Oklahoma, 486 F.3d 74 (10th Cir. 2006).

The Petitioner asserts for the reasons set forth below, that all of his claims are exhausted, or in the alternative, if there are any that are deemed to be unexhausted, that attempt to exhaust would be futile, since the lower courts have denied his claims on statute of limitations and procedural grounds. Petitioner also asserts for the reasons set forth below, that statutory tolling and equitable tolling should be applied in his case.

Therefore, in the interest of justice, Petitioner asserts that this Court should hear his claims on the merits. Simpson v. Matesanz, 175 F.3d 2001 (1st Cir. 1999) ("Federal habeas court may excuse Petitioner's procedural default if he can demonstrate either "cause" for and resulting prejudice from the default, or that he has suffered a fundamental miscarriage of justice.") and also, Ross v. Ward, 165 F.3d 793 (10th Cir. 1999). (Habeas courts duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case.) Under this principle, life in prison involves the same level of care, as the sentence results in deprivation of liberties for the remainder of Petitioner's life, and if such deprivation is unconstitutionally imposed, must be remedied, in order to preserve fundamental rights to justice, equal protection, and due process of law.

* * * *

STATUTORY TOLLING

A. 2244(d)(1)(A)- Direct or other collateral review

Pursuant to State law, there is no time limit for pursuing a collateral attack on the validity of conviction of a Class I felony. See: 16 C.R.S. 16-5-402(1).

Petitioner was denied a meaningful direct review due to ineffective assistance of counsel, who should have raised these clear and substantial claims and failed to do so.

Petitioner previously filed a petition for habeas corpus in 1994, which was denied due to failure to exhaust his claims in the State courts. The order denying his habeas petition affirmatively states that there is no time limit for him to appeal.

A state postconviction application "remains pending" "until the application has achieved final resolution through the State's postconviction procedures." Carey v. Saffold, 536 U.S. 214, 220.

As we stated in Carey v. Saffold, 536 U. S. 214, 220 (2002) (internal quotation marks omitted), a state postconviction application "remains pending" "until the application has achieved final resolution through the State's postconviction procedures." This Court is not a part of a "State's post-conviction procedures." State review ends when the state courts have finally resolved an application for state post-conviction relief After the State's highest court has issued its mandate or denied review, no other state avenues for relief remain open. And an application for state post-conviction review no longer exists. All that remains is a separate certiorari petition pending before a federal court.

Indeed, AEDPA's exhaustion provision and tolling provision work together:

"The tolling provision of §2244(d)(2) balances the interests served by the exhaustion requirement and the limitation period.... Section 2244(d)(1)'s limitation period and §2244(d)(2)'s tolling provision, together with §2254(b)'s exhaustion requirement, encourage litigants first to exhaust all state remedies and then to file their federal habeas petitions as soon as possible." Duncan v. Walker, 533 U. S. 167, 179, 181 (2001) (final emphasis added).

State remedies are exhausted at the end of state-court review. Fay, supra, at 435-438; Allen, supra, at 149-150, n. 7.

"The time during which a properly filed application for State post conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection."

A few points should be considered. First, the one-year limitation period begins to run from the latest of several events, typically the end of direct review in the state court. See 28 U.S.C. § 2244(d)(1). Second, the AEDPA provides that the one-year limitation period is tolled when a petitioner is pursuing "properly filed" claim for postconviction relief. *See* 28 U.S.C. § 2244(d)(2). The federal courts have generally concluded that "properly filed" as used in this statute means that the petition was filed in conformance with the basic technical rules of the state court. *See generally Lovasz v. Vaughn*, 134 F.3d 146, 148-49 (3d Cir. 1998); *Galindo v. Johnson*, 19 F.Supp. 2d 697 (W.D. Tex. 1998); *Ellis v. Johnson*, 11 F.Supp.2d 695, 698 (N.D. Tex. 1998); *Williams v. Vaughn*, 3 F.Supp.2d 567, 577 (E.D. Pa. 1998); *Holloway v. Corcoran*, 980 F.Supp. 160, 162 n.5 (D.Md. 1997); *Hughes v. Irvin*, 967 F.Supp. 775, 778 (E.D.N.Y. 1997). *But see Dictado v. DuCharme*, --- F.3d ---, 1999 WL 646953 (9th Cir., August 26, 1999).

It is unclear whether a federal habeas corpus proceeding will be deemed as "pending" at any time before a habeas petition itself has been filed with the District Court. In one recent case, however, an en banc panel of the Ninth Circuit noted that a threshold request for appointment of counsel and for leave to file a petition for habeas corpus commences the habeas "case" within the meaning of the AEDPA. *See Calderon v. United States District Court*, 163 F.3d 530 (9th Cir. 1998) (en banc) ("*Kelly*").

Since the application was properly filed, as there is no statute of limitations on appeal of first degree murder conviction, this constitutes an allowable "other collateral review." The petitioner diligently exhausted his claims through the State courts, which failed to hear his claims on the merits. The current habeas petition was filed within one year of when the State court's decision became final, which is prior to the expiration of the time limit for seeking such review under 2244(d)(1)(A).

* * * *

D. 2244(d)(2)-Tolling should start upon filing in 2004

Serrano v. Williams, 02-2268 (10th Cir. 2004) states as follows:

"III. Statutory Tolling

The AEDPA provides that "[t]he time during which a properly filed application for State post-conviction or other collateral review ... is pending shall not be counted toward any period of limitation." 28 U.S.C. 2244(d)(2).

The statute itself provides no definition of "pending," but we have determined that the pendency of a post-conviction application must be interpreted under federal law. Gibson v. Klinger, 232 F.3d 799, 806 (10th Cir. 2000). In our decisions, we have construed the pendency of a state post-conviction application as "encompass[ing] all of the time during which a state prisoner is attempting, through proper use of state court procedures, to exhaust state court remedies." Barnett v. LeMaster, 167 F.3d 1321, 1323 (10th Cir. 1999). In Gibson, we further defined the "pending" period and held that "regardless of whether a petitioner actually appeals a denial of a post-conviction application, the limitations period is tolled during the period in which the petitioner could have sought an appeal under state law." 232 F.3d at 804 (emphasis in original).

CONCLUSION

In light of all the reasons above, Petitioner asserts that he has shown the requisite cause necessary for overcoming statute of limitation considerations, in accordance with the Order of this Court, and accordingly for granting habeas corpus relief.

Respectfully Submitted,

/s/_________________3/18/08
PATRICK WOOD, #56182
Sterling Correctional Facility
PO Box 6000
Sterling, CO 80751

APPENDIX E — District Court Order of Dismissal, Filed April 3, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 08-cv-00247-BNB

PATRICK WOOD,

Applicant,

v.

KEVIN MILYARD, Warden, Sterling Correctional Facility, and THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents.

ORDER OF DISMISSAL

Applicant, Patrick Wood, is a prisoner in the custody of the Colorado Department of Corrections (DOC) who currently is incarcerated at the Sterling, Colorado, correctional facility. Mr. Wood flied *pro se* an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (2006). He has paid the $5.00 filing fee.

On February 19, 2008, Magistrate Judge Boyd N. Boland ordered Mr. Wood to show cause within thirty days why the habeas corpus application should not be denied as time-barred under 28 U.S.C. § 2244(d) (2006). On March 20, 2008, Mr. Wood submitted his response to the order to show cause. On March 21, 2008, he submitted a motion for an extension of time to file a response to the show-cause order. The motion for an extension of time will be granted.

The Court must construe liberally the habeas corpus application and the response to the application because Mr. Wood is representing himself. ***See Haines v. Kerner***, 404 U.S. 519, 520-21 (1972); ***Hall v. Bellmon***, 935 F.2d 1106, 1110 (10th Cir. 1991). However, the Court should not be the ***pro se*** litigant's advocate. ***See Hall***, 935 F.2d at 1110. For the reasons stated below, the application will be denied.

Mr. Wood alleges that he was convicted in Adams County District Court Criminal Action No. 86CR123 on charges of second-degree murder, first-degree felony murder, attempt to commit aggravated robbery, and felony menacing. The trial court sentenced him to the DOC for forty years to life. He alleges that on January 21, 1987, the judgment of conviction was entered. On May 4, 1989, his convictions were affirmed on direct appeal. On October 23, 1989, certiorari review was denied.

On January 26, 1994, he filed a habeas corpus application in this Court, which on March 22, 1995, accepted and adopted former Magistrate Judge Richard M. Borchers' August 1, 1994, recommendation, and denied the application for failure to exhaust state remedies. ***See Wood v. Furlong***, 94-cv-00219-JLK (D. Colo. Mar. 22, 1995). He alleges that on August 19, 2004, he filed a postconviction motion pursuant to Rule 35(c) of the Colorado Rules of Criminal Procedure, which the trial court denied on September 3, 2004. On August 3, 2006, the Colorado Court of Appeals affirmed. On February 5, 2007, certiorari review was denied. Mr. Wood asserts five claims. He alleges that he has presented each claim fairly to the state's highest court. Therefore, the Court need not address the issue of exhaustion.

It is clear on the face of the application that this action is time-barred. ***See Kilgore v. Estep***, ___ F.3d ___, 2008 WL 638727, at *5 (10th Cir. Mar. 11, 2008). Pursuant to 28 U.S.C. § 2244(d) (2006), a one-year limitation period applies to the instant action. Section 2244(d) specifically provides as follows:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of–
>
>> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>>
>> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>>
>> (C) the date on which the constitutional right asserted was initially recognized

> > by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> >
> > (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d).

Magistrate Judge Boland determined in the February 19, 2008, show-cause order when the one-year limitation period began to run based upon Mr. Wood's allegations. Mr. Wood alleges that on October 23, 1989, certiorari review was denied on direct appeal. Mr. Wood's conviction and sentence became final prior to April 24, 1996, the date the one-year limitation period in 28 U.S.C. § 2244(d) was enacted into law. Therefore, in the absence of any reason to toll the limitations period, Mr. Wood should have initiated this action prior to April 24, 1997, one year after the statute's effective date. ***See United States v. Simmonds***, 111 F.3d 737, 746 (10th Cir. 1997). The instant action was submitted to the Court on February 5, 2008, well beyond the one-year limitation period.

Applicant filed his postconviction proceeding on August 19, 2004, over seven years after the one-year limitations period expired. Therefore, the postconviction proceeding did not toll the one-year limitations period. In his response to the show-cause order, Mr. Wood does not contest the magistrate judge's calculations. Instead, he argues that he is entitled to equitable tolling (1) because his attorney filed a limited direct appeal following his 1987 conviction; (2) because he was transferred out of state to a Minnesota facility from April 1997 through December 1998, which precluded him from researching and filing his claims in state court; (3) because in August 2000 he suffered a back injury requiring surgery in October 2000, was transferred to two different state facilities, and continued to have medical issues through May 2003; and (4) because he relied upon former Magistrate Judge Borchers' August 1, 1994, recommendation to assume he had no time limit on exhausting his claims.

The one-year limitation period in 28 U.S.C. § 2244(d) is not jurisdictional and may be tolled for equitable reasons in appropriate extraordinary situations when circumstances beyond a prisoner's control make it impossible to file the habeas corpus application on time. ***See Miller v. Marr***, 141 F.3d 976, 978 (10th Cir. 1998). However, equitable tolling is appropriate only if the inmate pursues his or her claims diligently. ***See id.***

None of Mr. Wood's arguments warrants equitable tolling. Exhaustion is not an issue in this action. Mr. Wood provides no explanation for his lack of diligence in pursuing his claims prior to his 1997 transfer to a Minnesota facility. Moreover, it is well established that "'ignorance of the law, even for an incarcerated pro se [applicant], generally does not excuse prompt filing,'" ***Marsh v. Soares***, 223 F.3d 1217, 1220 (10th Cir. 2000) (quoting ***Fisher v. Johnson***, 174 F.3d 710, 714 (5th Cir. 1999)). Therefore, the application, in keeping with ***Kilgore***, clearly is untimely on its face and is barred by the one-year limitation period. ***See Rubio-Diaz v. Milyard***, No. 07-1355, 2008 WL 695894 (10th Cir. Mar. 14, 2008) (unpublished). Accordingly, it is

ORDERED that the motion for an extension of time to file a response to the show-cause order that Applicant, Patrick Wood, submitted to the Court on March 21, 2008, is granted. It is

FURTHER ORDERED that the habeas corpus application is denied as barred by the one-year limitation period in 28 U.S.C. § 2244(d).

DATED at Denver, Colorado, this 3 day of April, 2008.

BY THE COURT:

/s/ ______________________
ZITA L. WEINSHIENK,
Senior Judge
United States District Court

APPENDIX F — Wood's Motion For Reconsideration of Dismissal, Filed April 21, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 08-cv-00247-BNB

PATRICK WOOD,

Applicant,

v.

KEVIN MILYARD, Warden, Sterling Correctional Facility, and THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents.

MOTION FOR RECONSIDERATION

COMES NOW Petitioner, in the manner of pro se, and respectfully requests that this honorable Court reconsider its Order of Dismissal in this case issued on April 3, 2008, and its Order denying his Second Motion for Extension of Time issued on April 4, 2008. As grounds therefore, Petitioner states as follows:

SECOND MOTION FOR EXTENSION OF TIME

Since Petitioner was not allowed the additional time as requested in his Second Motion for Extension of Time, to amend his Response to Order to Show Cause, some of the items appear to be unclear. Petitioner respectfully requests that this Court reconsider the denial of Petitioner's Second Motion for Extension of Time and allow him to amend his Response to make the issues more clear and complete.

Petitioner was only allowed two days, for two hours, in the law library (See Attachment A — the law library schedule for the month of April 2008), which does not provide anywhere close to adequate time to research and learn the intricacies of the AEDPA. This body of law has been voluminously contested, and is still being interpreted in different and conflicting ways over ten years after its enactment.

If given more time, Petitioner could better and more clearly and completely present his response to this Court's order if given more time to do so, which would be of benefit to all involved in this litigation. Further, since the time in his Second Motion for Extension of Time has already passed, Petitioner respectfully requests that he be given two weeks from the date of the Court's order in which to file his amended Response, to allow for the two weeks that he requested in his motion.

ORDER OF DISMISSAL

1. PETITIONER DID DISPUTE THE TIME CALCULATION AND FINDING THAT HIS PETITION SHOULD HAVE BEEN FILED IN APRIL 1997.

The Court states in its Order of Dismissal that Petitioner did not dispute the Court's calculations. This is incorrect. Petitioner first claims that the AEDPA time limitation does not apply to him at all, since the District Court previously told him that there was no time limit on bringing his claims, and never notified him differently, even after the AEDPA was passed. This directly disputes the Court's time calculation and finding that he should have filed his habeas petition by April of 1997.

The AEDPA is a law that applies generally to everyone, where what the U.S. District Court told him was specific to his case. It is absolutely reasonable to rely on what has been specifically written about his case directly, and to count on that being more directly applicable than a subsequently enacted general rule of law.

Further, Petitioner asserts that if it is found that the AEDPA does apply to his case, he is entitled to statutory tolling for the period from 1994 through the filing of his present habeas petition, which also disputes the time calculation asserted by the Court and the finding that it should have been filed in April 1997.

In both of these arguments, Petitioner disputes the start date of the calculation, which accordingly disputes the Court's calculation and finding of when his habeas petition should have been filed.

2. THE COURT DID NOT SPECIFICALLY ADDRESS PETITIONER'S ARGUMENT THAT HE IS ENTITLED TO STATUTORY TOLLING.

The Court did not acknowledge or address specifically Petitioner's claims that he is entitled to statutory tolling under 28 U.S.C. §2244(d).

28 U.S.C. §2244(d) states as follows:

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

Petitioner qualifies under this exception, because the judgment has not yet become final. Petitioner filed his habeas petition in 1994, and in the order of dismissal, the Court instructed him to exhaust his claims in the state courts, and specifically told him that there was no time limit on doing that. The Court never issued any notice that would change that determination.

> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

There were several impediments attributable to the State which prevented him from filing his action. Specifically, ineffective assistance of counsel prevented him from filing his claims on direct review, and ineffective assistance of counsel has been found to be an impediment attributable to the State. The State also prevented him from filing timely due to limited time in the law library, moving him to a different state and back again, and in creating a situation that caused Petitioner physical injury which required surgery and rehabilitation that affects him still to this day. The District Court's finding in its first Order of Dismissal that he needed to exhaust his claims before he could proceed, and that there was no time limit to do so, and Petitioner has in fact completed exhaustion of his claims, is also a State impediment that has now been removed.

> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

During the research and preparation of exhausting his State claims, Petitioner found additional instances of ineffective assistance of counsel that he could not have otherwise known. Petitioner also learned of other legal ramifications to his being convicted of two murder counts for the same victim, that he could not have known about earlier. All of these additional claims were exhausted through the State courts, and are now being presented in the current petition.

Petitioner is entitled to statutory tolling under (A), (B), and (D), and his claims should be heard.

3. THE COURT DID NOT SPECIFICALLY ADDRESS PETITIONER'S ARGUMENT THAT HE IS ACTUALLY AND LEGALLY INNOCENT.

Petitioner stands convicted of two murder counts for the same victim. Since this is unconstitutional, and in all other ways barred by law, Petitioner is actually and legally innocent of one murder count or the other. There is no alternative.

The District Court did not specifically address this claim in its Order of Dismissal.

4. THE INTENT OF THE AEDPA IS TO PREVENT ABUSE OF THE WRIT AND TO PROVIDE FINALITY IN STATE COURT DETERMINATIONS. IT IS NOT TO PREVENT HABEAS REVIEW AT ALL.

The facts and circumstance of Petitioner's case would merit consideration even as a second or successive petitioner.

28 U.S.C. §2244(b)(2)(B) states as follows:

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

As explained above, the factual predicate of Petitioner's claims could not have been discovered earlier through the exercise of due diligence, and the facts underlying the claim, if proven, would be sufficient to establish that, but for constitutional error, no reasonable factfinder would have found Petitioner guilty of the underlying offense. It is clearly established that a person cannot be convicted of two murder counts for the same victim. Accordingly, a reasonable factfinder would not have found Petitioner guilty of either one or the other, as it would be unconstitutional to find him guilty of both.

If Petitioner meets the standard for a second or successive petition, Petitioner should be afforded the opportunity to present his claims once in the first instance. Petitioner has not been afforded meaningful review on the merits of his case at the State or the Federal level. To deny him this meaningful review would be unconstitutional and would violate his right to due process of law.

Petitioner's claims involve clear constitutional violations, and his conviction is plainly and clearly unconstitutional on its face. There is not one court that has heard his claims on the merits. This is precisely the situation that the habeas was created for - to allow unbiased review at a federal level where the state courts fail to do so.

To deny this right under these circumstances would be inequitable, unjust, and would violate fundamental constitutional rights to which petitioner is entitled.

5. THERE IS NO ABUSE OF THE WRIT IN PETITIONER'S CASE.

The AEDPA, if it even applies in this case, was intended to prevent abuse of the writ. There is no abuse in this case. There are no allegations of abuse, nor any advantage to

Petitioner to delay the resolution of these claims. The only party that has suffered any hardship over the delay in this case, it is the Petitioner. Petitioner has a right to be heard once upon application for habeas. That is not disputed. The delay in filing the application did not damage the courts, as they are obligated to hear his case once anyway, and did not damage the State, as they are being asked to respond once anyway. There is no damage caused to the courts or to the State to have it heard later than it would had it been heard earlier.

Petitioner's case is distinguished from those under sentence of death, where there is a direct benefit to filing meritless claims in federal courts in order to delay the execution of their sentence. Petitioner is serving a life sentence, which is not in any way affected by the timing of his appeal.

The only party in this case that has been harmed by the delay is the Petitioner himself, therefore it stands to reason that he brought his claims as quickly and diligently as he was capable of doing.

6. PETITIONER WAS DILIGENT IN PURSUING HIS CLAIMS.

The Court in its order finds that Petitioner was not diligent in pursuing his claims, and specifically references the three year period between the dismissal of his first habeas petition and when he was moved out of state. It is important to note that this three year period occurred substantially before the time the AEDPA was even enacted, and under the District Court's instruction that there was no time limit in bringing his claims. For that three year time period, there was no diligence standard in effect at the time.

Since that time, Petitioner has spent over a decade discovering, ascertaining, researching, and presenting his claims through the federal and state courts, all on his own, without legal representation. As stated above, Petitioner was the only one that had anything to lose over delaying the process of presenting his claims.

Petitioner was diligently pursuing his claims, and yet no court through the process has granted him fair consideration on the merits.

7. PETITIONER PRESENTED ADEQUATE GROUNDS TO JUSTIFY EQUITABLE TOLLING.

While Petitioner claims that the AEDPA does not apply to his case at all, since he filed his first habeas petition well before its enactment, and was proceeding in accordance with the District Court's finding that there was no time limit to bring his claims, or in the alternative, that he is entitled to statutory tolling for the reasons stated above, he argues further in the alternative, that equitable tolling should apply in his case.

By defining the purpose of the AEDPA as prevention of abusive delays in the habeas system, the court was not bound to formalistically bar every untimely habeas petition, only abusive delays. The court could inquire into the presence of any abusive purpose behind the delay in filing. Finding no evidence of abuse in Fahy, [See id. (remarking on the lack of abusive purpose behind the defendant's late habeas petition).] equitably tolling the statute presented no real conflict with the AEDPA's purpose. *See Fahy v. Horn*, 240 F.3d 239, 245 (3d Cir. 2001)

The Court did not find any abusive purpose and did not inquire as to any in its Order of Dismissal. In the absence of abuse, and in light of Petitioner's diligent efforts in pursuing his claims to the best of his ability, equitable tolling in this case does not present any real conflict with the AEDPA's purpose. In the absence of any real conflict with the AEDPA's purpose, it would be inequitable to bar Petitioner's action under its authority.

Equitable tolling is typically denied in cases where a litigant's own mistake clearly contributed to his predicament *See Lawrence v. Florida*, 127 S.Ct. 1079, 1085 (2007).

The Court states in its Order of Dismissal essentially that his ignorance of the law is no excuse. Petitioner was not ignorant of the law. Petitioner rightfully relied upon the District Court's finding that there was no time limit in bringing his claims. There was no reason for Petitioner to assume that a later enacted law, the AEDPA, would apply in his case. The delay in filing his petition was not due to ignorance of the law, nor his own mistake. If the District Court was going to change it's finding that there was no time limit upon enactment of the AEDPA, the District Court should have informed Petitioner of this substantial change. Since it did not, Petitioner should be granted equitable tolling and be allowed to proceed with a fair review of his case on the merits in federal court.

The 9th Circuit Court in *Harris v. Carter*, No. 06-35313, 9th Cir., Feb. 8, 2008, states as follows:

"The fact that Harris *could* have filed a timely federal habeas petition at a certain point in time is not dispositive. The critical fact here is that Harris relied in good faith on then-binding circuit precedent in making his tactical decision to delay filing a federal habeas petition. Harris' failure to file a timely petition is not the result of oversight, miscalculation or negligence on his part, all of which would preclude the application of equitable tolling. *See Lawrence, supra*, 127 S. Ct. at 1085."

On the other hand, it likely would be an abuse of discretion for a district court to deny a stay and to dismiss a mixed petition if the petitioner had good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that the petitioner engaged in intentionally dilatory litigation tactics. In such circumstances, the district court should stay, rather than dismiss, the mixed petition. *See Rose v. Lundy*, 455 U.S. 509, 522 (1982) (the total exhaustion requirement was not intended to "unreasonably impair the prisoner's right to relief"). In such a case, the petitioner's interest in obtaining federal review of his claims outweighs the competing interests in finality and speedy resolution of federal petitions. For the same reason, if a petitioner presents a district court with a mixed petition and the court determines that stay and abeyance is inappropriate, the court should allow the petitioner to delete the unexhausted claims and to proceed with the exhausted claims if dismissal of the entire petition would unreasonably impair the petitioner's right to obtain federal relief. *See id.* at 520 (plurality opinion) ("[A petitioner] can always amend the petition to delete the unexhausted claims, rather than returning to state court to exhaust all of his claims"). *Rhines v. Weber*, 544 U.S. 269, 279 (2005)

The same principles involved in the filing of a mixed petition apply in this case. Petitioner asserts that it would be an abuse of discretion for the Court to dismiss this case since Petitioner had good cause for his failure to file earlier, his claims are potentially meritorious, and there is no indication that Petitioner is engaging in intentionally dilatory litigation tactics. Further, Petitioner's interest in obtaining federal review of his claims outweighs the competing interests in finality and speedy resolution of federal petitions.

In *Pliler v. Ford*, 542 U.S. 225 (2004), the Supreme Court remanded because of the possibility that a petitioner relied upon, and was misled by, a district court's representations. *See Pliler v. Ford*, 542 U.S. 225, 234 (2004) (remanding to the Ninth Circuit to consider whether a concern that a petitioner was "affirmatively misled" by a magistrate judge was grounds for equitable tolling); *id.* at 235 (O'Connor, J., concurring) (noting that equitable tolling "might well be appropriate" if the petitioner was "affirmatively misled" by a court "or the State"). Such is the case here.

Petitioner was informed by the District Court that he had no time limit to bring his claims, and was never thereafter given the option of proceeding within the AEDPA's time limit or forever losing any chance at federal review. Had he been so notified, he could have at least proceeded with what he had at that time, and ensured a meaningful review on his claims that he was aware of at that time in the federal court. Instead, in spite of his bringing substantial claims, including the claims of being convicted of two murder counts for the same victim and ineffective assistance of counsel, well before the AEDPA was even enacted, he is now being barred from having them heard even once at all.

This does not comport with the purpose and intent of the AEDPA, nor the President's intent in signing it into law, nor the principles of fairness, equity and due process long held in high regard in our judicial system and provided for in our Constitution.

CONCLUSION

All Petitioner asks is for a fair opportunity to present his claims for the first time in federal court, and for the Court to consider his claims and issue a finding on the merits, to correct the constitutional errors that are plain and clear on their face, and afford Petitioner due process of law, which is the fundamental purpose of habeas review.

Therefore, Petitioner respectfully requests that this honorable Court reconsider its Order of Dismissal and its

Appendix F

Order denying Petitioner's Second Motion for Extension of Time.

Respectfully submitted this APRIL day of 18th 2008

/s/

PATRICK WOOD, DOC #56182
Sterling Correctional Facility
PO Box 6000
Sterling, CO 80751

APPENDIX G — District Court Order Granting Wood's Motion to Reconsider Dismissal, Filed May 22, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 08-cv-00247-ZLW

PATRICK WOOD,

Applicant,

v.

KEVIN MILYARD, Warden, Sterling Correctional Facility, and THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents.

ORDER GRANTING MOTION TO RECONSIDER

Applicant, Patrick Wood, is a prisoner in the custody of the Colorado Department of Corrections who currently is incarcerated at the Sterling, Colorado, correctional facility. Mr. Wood filed ***pro se*** an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (2006). He paid the $ 5.00 filing fee.

On February 19, 2008, Magistrate Judge Boland ordered Mr. Wood to show cause within thirty days why the habeas corpus application should not be denied as time-barred. On March 20, 2008, the day that thirty-day period ended, Mr. Wood submitted his response to the order directing him to show cause. On April 3, 2008, the Court denied the application as time-barred, and dismissed the action. On the same day, Mr. Wood filed a motion for extension of time seeking additional time in which to submit a final response to the show-cause order. On April 4, 2008, the motion for extension of time was denied by minute order as moot.

On April 21, 2008, Mr. Wood filed a motion for reconsideration, seeking reconsideration of the April 3, 2008, dismissal order and judgment and of the April 4, 2008, minute order denying his motion for extension of time as moot. The motion for reconsideration will be granted. The Court will vacate the April 3 Order of Dismissal and Judgment. However, in lieu of ordering Mr. Wood to file a final response to the February 19, 2008, show-cause order, the Court will issue a separate order directing the state attorney general to file a pre-answer response within thirty days. A copy of that order, and of the pre-answer response, will be mailed to Mr. Wood, and he will be afforded an opportunity to reply to the response. Accordingly, it is

ORDERED that the motion for reconsideration that Applicant, Patrick Wood, filed on April 21, 2008, is granted. It is

FURTHER ORDERED that the April 3, 2008, Order of Dismissal and Judgment are vacated.

DATED at Denver, Colorado, this 21 day of May, 2008.

BY THE COURT:

/s/

ZITA L. WEINSHIENK, Senior Judge
United States District Court

APPENDIX H — District Court Order Directing State to File Pre-Answer Response, Filed May 29, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 08-cv-00247-BNB

PATRICK WOOD,

Applicant,

v.

KEVIN MILYARD, Warden, Sterling Correctional Facility, and THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents.

ORDER TO FILE PRE-ANSWER RESPONSE

As part of the preliminary consideration of the Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 in this case and pursuant to ***Denson v. Abbott***, 2008 WL 1970935 (D. Colo. 2008), the Court has determined that a limited Pre-Answer Response is appropriate. Respondents are directed pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts to file a Pre-Answer Response limited to addressing the affirmative defenses of timeliness under 28 U.S.C. § 2244(d) and/or exhaustion of state court remedies under 28 U.S.C. § 2254(b)(1)(A). If Respondents do not intend to raise either of these affirmative defenses, they must notify the Court of that decision in the Pre-Answer Response. Respondents may not file a dispositive motion as their Pre-Answer Response, or an Answer, or otherwise address the merits of the claims in response to this Order.

In support of the Pre-Answer Response, Respondents should attach as exhibits all relevant portions of the state court record, including but not limited to copies of all documents demonstrating whether this action is filed in a timely manner and/or whether Applicant has exhausted state court remedies.

Applicant may reply to the Pre-Answer Response and provide any information that might be relevant to the one-year limitation period under 28 U.S.C. § 2244(d) and/or the exhaustion of state court remedies. Applicant also should include information relevant to equitable tolling, specifically as to whether he has pursued his claims diligently and whether some extraordinary circumstance prevented him from filing a timely 28 U.S.C. § 2254 action in this Court. Accordingly, it is

ORDERED that **within twenty (20) days from the date of this Order** Respondents shall file a Pre-Answer Response that complies with this Order. It is

FURTHER ORDERED that **within twenty (20) days of the filing of the Pre-Answer Response** Applicant may file a Reply, if he desires. It is

FURTHER ORDERED that if Respondents do not intend to raise either of the affirmative defenses of timeliness or exhaustion of state court remedies, they must notify the Court of that decision in the Pre-Answer Response.

DATED May 28, 2008, at Denver, Colorado.

BY THE COURT:

/s/ Boyd N. Boland
United States Magistrate Judge

APPENDIX I — Excerpt From State's Pre-Answer Response, Filed June 17, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 08-cv-00247-BNB

PATRICK WOOD, JR.,

Applicant,

v.

KEVIN MILYARD, Warden, Sterling Correctional Facility, and JOHN SUTHERS, THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents.

PRE-ANSWER RESPONSE

Respondents, having been served with this Court's order to file a pre-answer response, respond, through the Attorney General of the State of Colorado, as follows:

I. Relevant Factual Background

In 1986, Wood was charged with first degree murder after deliberation, felony murder, aggravated robbery, and two counts of felony menacing for shooting and killing a restaurant cashier. Employees of the restaurant held Wood until police arrived. A jury found him guilty of the robbery and menacing counts, but was unable to reach a verdict on the murder counts. Wood waived his right to a jury trial on the murder counts in exchange for withdrawing the death penalty from consideration, and the district court found him guilty of felony murder and second degree murder following a bench trial (Exhibits A, J).

The district court merged the murder and aggravated robbery counts, and sentenced Wood to a life term on January 21, 1987. Wood's convictions were affirmed on direct appeal in *People v. Wood*, (Colo. App. No. 87CA0273, May 4, 1989) (not selected for publication) (Exhibit A). Wood sought certiorari review in the Colorado Supreme Court, which was denied on October 23, 1989. The mandate was issued on December 13, 1989 (Exhibits A, J).

In 1994, Wood filed a pro se petition for writ of habeas corpus in the United States District Court, which was denied on August 1, 1994, on the basis that Wood had not exhausted his claims in the state courts (Exhibit B).

On June 29, 1995, Wood filed a motion for appointment of counsel, an affidavit of indigency, and a motion "to vacate judgment of conviction and sentence" in the state district court (Exhibit C). The district court granted his request for the appointment of counsel in December 1995 (Exhibits B, D). It does not appear, however, that the trial court ruled on the postconviction motion or that Wood requested a ruling (Exhibit D).

Over nine years later, on August 30, 2004, Wood filed a postconviction motion seeking to vacate his convictions on several grounds (Exhibit E). The district court denied the motion (Exhibit F). Wood appealed, and the Colorado Court of Appeals affirmed the district court's order in *People v. Patrick K. Wood,* (Colo. App. No. 04CA2252, Aug. 3, 2006) (not selected for publication) (Exhibits G, J). Wood sought certiorari review in the Colorado Supreme Court, which was denied on February 5, 2007 (Exhibits K, L).

The instant federal habeas petition was filed on February 5, 2008.

II. AEDPA Statute of Limitations

Under 28 U.S.C. § 2244(d), a one-year limitations period applies to applications for writ of habeas corpus. In general, this limitations period runs from the date on which the state judgment became final following direct appeal. § 2244(d)(l)(A). An applicant's conviction generally becomes final, following a decision by the state court of last resort, "after the United States Supreme Court has denied review, or, if no petition for certiorari is filed, after the time for filing a petition for certiorari with the Supreme Court has passed." *Locke v. Saffle*, 237 F.3d 1269, 1273 (10th Cir. 2001). In addition, under 28 U.S.C. § 2244(d)(2), the one-year period is tolled during the period in which a "properly filed application for state postconviction or other collateral review with respect to the pertinent judgment or claim is pending."

Because Wood's conviction was final in 1989 before the effective date of the AEDPA, his time for filing a petition began to run on April 24, 1996, when the AEDPA became effective. Thus, he had until April 24, 1997, plus any tolling periods, to timely file his habeas petition. *United States v. Hurst,* 322 F.3d 1256, 1259-61 (10th Cir. 2003).

As previously noted, Wood filed postconviction motions in the state district court in 1995 and 2004. It is clear that if Wood had filed only the 2004 motion his habeas petition would be untimely because the motion was filed long after his time for filing a habeas petition had passed. But it is unclear how the 1995 postconviction motion, which apparently was never ruled upon, affects the timeliness of Wood's habeas petition. While it is certainly arguable that the 1995 postconviction motion was abandoned before 1997 and thus did not toll the AEDPA statute of limitations at all, see *People v. Mamula,* 847 P.2d 1135 (Colo. 1993) (Crim. P. 35(b) motion for reduction of sentence deemed abandoned as a matter of law where circumstances were such that 20-month delay in seeking a ruling was unreasonable), Respondents will not challenge, but are not conceding, the timeliness of Wood's habeas petition in this pre-answer response.

* * *

[REMAINDER OF DOCUMENT OMITTED]

APPENDIX J — Excerpt From Wood's Reply to the State's Pre-Answer Response, Filed July 7, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 08-cv-00247-BNB

PATRICK WOOD,

Applicant,

v.

KEVIN MILYARD, Warden, Sterling Correctional Facility, and THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents.

REPLY TO PRE-ANSWER RESPONSE

COMES NOW Patrick Wood, the Petitioner, in the manner of pro se, and respectfully submits this Reply to Pre-Answer Response. As grounds therefore, Petitioner states as follows:

I. AEDPA Statute of Limitations

Respondents specifically state that they do not challenge the timeliness of the petition. In the absence of Respondents raising this issue as a defense, and in the absence of challenging the timeliness of the petition, the petition should be considered timely and be allowed to proceed.

Respondents claim that it is arguable that the appeal was abandoned, then they cite to *People v. Mamula*, 847 P.2d 1135 (Colo. 1993) (Crim. P. 35(b) motion for reduction of sentence deemed abandoned as a matter of law where circumstances were such that 20-month delay in seeking a ruling was unreasonable). It is important to note that Respondents do not say they are in fact arguing this position, only that it is arguable. Further, the cited case involved a motion for reduction of sentence, after a 20 month delay in which nothing was done, which is easily distinguished from the filing of a petition for habeas corpus on issues relating to conviction and sentence, along with years of exhausting claims through the state courts accounting for a large part of the delay.

Petitioner asserts that the AEDPA does not apply to his case at all, since he filed his first habeas petition well before its enactment, and was proceeding in accordance with the District Court's finding that there was no time limit to bring his claims. Respondents, when given the opportunity to argue this issue, even state that it is unclear what effect the first petition has on the timeliness of the filing of the current petition, and state that they do not challenge its timeliness.

In the alternative, should it be found that the AEDPA does apply in this case, Petitioner asserts that he is entitled to statutory tolling for the reasons stated previously in his Response to Order to Show Cause and Motion for Reconsideration.

Alternatively, should the AEDPA be found to apply in this case, and should it be determined that statutory tolling does not apply, equitable tolling should apply, for many reasons as previously stated in his Response to Order to Show Cause and Motion for Reconsideration, independently and/or cumulatively. Petitioner should be granted equitable tolling especially since he has not had one opportunity to present his claims and have a decision made on the merits, that Petitioner was specifically told by the District Court that there was no time limit to proceed, and that there is no abuse of the habeas process, nor has any abuse been alleged, therefore equitably tolling the statute presents no real conflict with the AEDPA's purpose. In the interests of justice, Petitioner respectfully requests that this honorable Court allow him to proceed and have his issues considered on the merits.

* * * *

[REMAINDER OF DOCUMENT OMITTED]

APPENDIX K — District Court Order to Overrule Objection, Dismiss in Part, and Draw Remaining Claims to a District Judge and to a Magistrate Judge, Filed September 22, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 08-cv-00247-BNB

PATRICK WOOD,

Applicant,

v.

KEVIN MILYARD, Warden, Sterling Correctional Facility, and THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents.

ORDER TO OVERRULE OBJECTION, DISMISS IN PART, AND DRAW REMAINING CLAIMS TO A DISTRICT JUDGE AND TO A MAGISTRATE JUDGE

Applicant, Patrick Wood, is a prisoner in the custody of the Colorado Department of Corrections (DOC) who currently is incarcerated at the Sterling, Colorado, correctional facility. Mr. Wood filed ***pro se*** an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (2006). He paid the $ 5.00 filing fee.

In an order filed on May 29, 2008, Magistrate Judge Boyd N. Boland ordered Respondents to file within twenty days a Pre-Answer Response limited to addressing the affirmative defenses of timeliness under 28 U.S.C. § 2244(d) and/or exhaustion of state court remedies under 28 U.S.C. § 2254(b)(1)(A). On June 17, 2008, Respondents filed their Pre-Answer Response asserting that the instant action is subject to dismissal as a mixed petition containing both exhausted and unexhausted claims. On July 7, 2008, Mr. Wood filed a Reply to Pre-Answer Response.

In an order filed on August 15, 2008, Magistrate Judge Craig B. Shaffer directed Mr. Wood to show cause within thirty days why the application should not be denied as a mixed petition. Alternatively, Magistrate Judge Shaffer informed Mr. Wood that rather than have the Court dismiss the application as a mixed petition, he would be allowed to dismiss voluntarily the unexhausted claims and proceed on the exhausted claims. On September 15, 2008, Mr. Wood submitted his response titled "Objection to Finding of Unexhausted Claims, and Motion to Dismiss Voluntarily Claims Deemed Unexhausted and to Proceed on Exhausted Claims."

The Court must construe liberally the application, the Reply, and the combination objection and partial voluntary dismissal filed by Mr. Wood because he is not represented by an attorney. ***See Haines v. Kerner***, 404 U.S. 519, 520-21 (1972); ***Hall v. Bellmon***, 935 F.2d 1106, 1110 (10th Cir. 1991). However, the Court should not be an advocate for a ***pro se*** litigant. ***See Hall***, 935 F.2d at 1110. In the combination objection and partial voluntary dismissal, Mr. Wood appears to object to Magistrate Judge Shaffer's August 15, 2008, order directing him to show cause why the application should not be denied as a mixed petition and to his finding that certain asserted claims are unexhausted. For the reasons stated below, the objection will be construed as filed pursuant to 28 U.S.C. § 636(b)(1)(A), and will be overruled.

Pursuant to § 636(b)(1)(A), a judge may reconsider any pretrial matter designated to a magistrate judge to hear and determine where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law. The Court has reviewed the file and finds that Magistrate Judge Shaffer's August 15, 2008, order is not clearly erroneous or contrary to law. Therefore, Mr. Wood's objection will be overruled. For the reasons stated below, the August 15 "Motion to Dismiss Voluntarily Claims Deemed Unexhausted and to Proceed on Exhausted Claims" will be granted.

Mr. Wood alleges that he was convicted in 1986 in Adams County District Court Criminal Action No. 86CR123 on charges of second-degree murder, first-degree felony murder, aggravated robbery, and felony menacing. The trial court sentenced him to the DOC for forty years to life. He alleges that on January 21, 1987, the judgment of conviction was entered. On May 4, 1989, his convictions were affirmed on direct appeal. ***See People v. Wood,*** No. 87CA0273 (Colo. Ct. App. May 4, 1989) (not published). On October 23, 1989, the Colorado Supreme Court denied certiorari review.

On January 26, 1994, he filed a habeas corpus application in this Court, which on March 22, 1995, accepted and adopted former Magistrate Judge Richard M. Borchers' August 1, 1994, recommendation, and denied the application for failure to exhaust state remedies. ***See Wood v. Furlong,*** 94-cv-00219-JLK (D. Colo. Mar. 22, 1995). On June 29, 1995, Mr. Wood filed in state court a motion for appointment of counsel, an affidavit of indigency, and a motion to vacate judgment of conviction and sentence. ***See*** Response at ex. D. However, despite the fact that on October 30, 1995, Mr. Wood filed a request for a ruling on the previously filed motions, the trial court apparently only ruled on the motion for appointment of counsel, granting it on December 1, 1995. ***See*** Response at ex. D.

Mr. Wood alleges that on August 19, 2004, he filed a postconviction motion pursuant to Rule 35(c) of the Colorado Rules of Criminal Procedure, which the trial court denied on September 3, 2004. On August 3, 2006, the Colorado Court of Appeals affirmed. ***See People v. Wood,*** No. 04CA2252 (Colo. Ct. App. Aug. 3, 2006) (not published). On February 5, 2007, the Colorado Supreme Court denied certiorari review. On February 8, 2008, Mr. Wood filed the instant habeas corpus application.

Pursuant to 28 U.S.C. § 2254(b)(1), an application for a writ of habeas corpus may not be granted unless it appears that the applicant has exhausted state remedies or that no adequate state remedies are available or effective to protect the applicant's rights. ***See O'Sullivan v. Boerckel,*** 526 U.S. 838 (1999); ***Dever v. Kansas State***

Penitentiary, 36 F.3d 1531, 1534 (10th Cir. 1994). The exhaustion requirement is satisfied once the federal claim has been presented fairly to the state courts. ***See Castille v. Peoples***, 489 U.S. 346, 351 (1989). Fair presentation requires that the federal issue be presented properly "to the highest state court, either by direct review of the conviction or in a postconviction attack." ***Dever***, 36 F.3d at 1534.

Furthermore, the "substance of a federal habeas corpus claim" must have been presented to the highest state court in order to satisfy the fair presentation requirement. ***Picard v. Connor***, 404 U.S. 270, 278 (1971); ***see also Nichols v. Sullivan***, 867 F.2d 1250, 1252 (10th Cir. 1989). Although fair presentation does not require a habeas corpus petitioner to cite "book and verse on the federal constitution," ***Picard***, 404 U.S. at 278 (internal quotation marks omitted), "[i]t is not enough that all the facts necessary to support the federal claim were before the state courts." ***Anderson v. Harless***, 459 U.S. 4, 6 (1982) (per curiam). A claim must be presented as a federal constitutional claim in the state court proceedings in order to be exhausted. ***See Duncan v. Henry***, 513 U.S. 364, 365-66 (1995) (per curiam).

Finally, "[t]he exhaustion requirement is not one to be overlooked lightly." ***Hernandez v. Starbuck***, 69 F.3d 1089, 1092 (10th Cir. 1995). A state prisoner bringing a federal habeas corpus action bears the burden of showing that he has exhausted all available state remedies. ***See Miranda v. Cooper***, 967 F.2d 392, 398 (10th Cir. 1992). Even if state remedies properly have been exhausted as to one or more of the claims presented, a habeas corpus application is subject to dismissal as a mixed petition unless state court remedies have been exhausted for all of the claims raised. ***See Rose v. Lundy,*** 455 U.S. 509, 522 (1982); ***Harris v. Champion,*** 48 F.3d 1127, 1133 (10th Cir. 1995).

Mr. Wood asserts five claims: (1)(a) that convicting him of both felony murder and second-degree murder of the same victim violates double jeopardy principles and (b) that convicting him of aggravated robbery and then using that offense as the predicate offense for the felony murder conviction violates double jeopardy principles; (2) that the waiver of his right to a jury trial on the murder counts was involuntary because defense counsel's advisement was inadequate and because the trial judge accepted his waiver without ensuring that it was made knowingly and voluntarily; (3) that his convictions were obtained in violation of his right not to incriminate himself, i.e., defense counsel advised him to testify at trial, which caused him to incriminate himself; (4) that his convictions were the result of ineffective assistance of both trial and appellate counsel, and specifically that trial counsel "was ineffective for advising [him] to waive his right to a second jury trial" and to "waive his right against self incrimination," in "failing to advocate on [his] behalf, and in failing to "move for the 1st Degree Felony Murder to be stricken from the trial judge's consideration" at the bench trial "or at least in the alternative in failing to accurately replay the implications of the felony murder statute to [him]" and "in failing to identify obvious and key issues on direct appeal," ***see*** application at 6a; and (5) that the felony murder statute violates equal protection principles because "it disproportionately imposes the same punishment on one who commits a murder with premeditation after deliberation, as on one who has no intent to kill whatsoever and accidentally does so during the course of a felony." *See* application at 6a – 6b.

Respondents conceded that Mr. Wood exhausted state court remedies for subpart (a) of claim 1 and for claim 2 in his 2004 postconviction motion. They argued that Mr. Wood failed to exhaust state court remedies for subpart (b) of claim 1, and for claims 3, 4, and 5. Respondents specifically contended that claims 1(b) and 3 have not been presented to the state courts. They maintained that the allegations in claim 3 were part of the ineffective assistance of counsel claim that Mr. Wood raised in his 1995 postconviction motion, which was never ruled upon by the state courts, but were not presented as a self-incrimination claim.

Respondents further contended that claim 4 contains allegations of ineffective assistance of counsel that have not been presented to state court. They specifically contended that in the 1995 postconviction motion, Mr. Wood asserted that counsel was ineffective for advising him to testify that his shooting of the victim was an accident, and for failing to explain the law applicable to lesser-included offenses and the offenses of which he would be convicted. They further contended that in the 2004 postconviction motion, Mr. Wood asserted that counsel was ineffective for waiving his right to a jury trial on the murder counts without his consent, a claim that both the trial court and the Colorado Court of Appeals rejected on the merits. The state appeals court did not consider an additional allegation of ineffective assistance of counsel, i.e., that counsel was ineffective for advising Mr. Wood to testify at trial, because Mr. Wood made the allegation for the first time in his reply brief. Lastly, Respondents argued that claim 5 has not been presented to the state courts, although they maintained that Mr. Wood did raise a different equal protection claim in his 2004 postconviction motion, i.e., that the first-degree and second-degree murder statutes violate equal protection because there is no distinguishable difference between the two crimes, which was rejected by both the trial court and the Colorado Court of Appeals on the basis that it could have been raised on direct appeal.

Magistrate Judge Shaffer reviewed the relevant appellate court briefs, and agreed that claims 1(b), 3, 4, and 5 do not appear to have been exhausted. In his "Motion to Dismiss Voluntarily Claims Deemed Unexhausted and to Proceed on Exhausted Claims," Mr. Wood voluntarily dismisses unexhausted claims 1(b), 3, 4, and 5, and asks only to proceed on exhausted claims 1(a) and 2. Accordingly, it is

ORDERED that the "Objection to Finding of Unexhausted Claims" submitted on September 15, 2008, by Applicant, Patrick Wood, is overruled. It is

FURTHER ORDERED that the "Motion to Dismiss Voluntarily Claims Deemed Unexhausted and to Proceed on Exhausted Claims" submitted on September 15, 2008, by Applicant is granted. It is

FURTHER ORDERED that unexhausted claims 1(b), 3, 4, and 5 are dismissed. It is

FURTHER ORDERED that Applicant is allowed to proceed only on exhausted claims 1(a) and 2. It is

FURTHER ORDERED that the remaining claims 1(a) and (2) and the action are drawn to a district judge and to a magistrate judge.

DATED at Denver, Colorado, this 19 day of Sept., 2008.

BY THE COURT:

/s/
ZITA L. WEINSHIENK, Senior Judge
United States District Court

APPENDIX L — District Court Order Directing the State to File an Answer, Filed October 2, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 08-cv-00247-WYD-MJW

PATRICK WOOD,

Applicant,

v.

KEVIN MILYARD, Warden, Sterling Correctional Facility, and THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents.

ORDER TO ANSWER

After preliminary consideration of the Application For A Writ Of Habeas Corpus Pursuant To 28 U.S.C. § 2254, it is now

ORDERED that on or before Friday, October 31, 2008, the respondents shall file an answer conforming to the requirements of Rule 5 of the Rules Governing Section 2254 Cases.

Dated: October 2, 2008.

BY THE COURT:

/s/ Wiley Y. Daniel
UNITED STATES DISTRICT JUDGE

APPENDIX M — State's Answer to Application For Writ of Habeas Corpus, Filed October 30, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 08-cv-00247-WYD-MJW

PATRICK WOOD,

Applicant,

v.

KEVIN MILYARD, Warden, Sterling Correctional Facility, and JOHN W. SUTHERS, Attorney General of the State of Colorado,

Respondents.

ANSWER TO APPLICATION FOR WRIT OF HABEAS CORPUS

Respondents, having been served with this Court's order to answer why the application for a writ of habeas corpus should not be granted, answer, through the Attorney General of the State of Colorado, as follows:

I. General Denial

Respondents deny the allegations of the petition except as specifically admitted herein.

II. Lawful Custody

Applicant Wood appears to satisfy the jurisdictional requirement of lawful custody by virtue of the judgment and sentence of the District Court of Adams County in Case No. 86CR123. He was convicted of aggravated robbery and two menacing counts following a jury trial and second degree murder and felony murder following a bench trial. He was subsequently sentenced to a life term on the murder and robbery counts, which were merged, and to four years each for the two menacing counts in the Department of Corrections.

III. State Court Proceedings

The facts underlying Wood's conviction arose from an incident in 1986 when he robbed a restaurant and shot and killed the manager. Two employees subdued him and held him until the police arrived (Exhibits A, J).

Wood was charged with one count of murder after deliberation, felony murder, aggravated robbery, and two counts of felony menacing. A jury found him guilty of the robbery and menacing counts, but was unable to reach a verdict on the murder counts. In exchange for withdrawing the death penalty from consideration, Wood waived his right to a jury trial on the murder counts. At a subsequent bench trial, the court found him guilty of felony murder and second degree murder. At sentencing, the court merged the murder and robbery counts, and sentenced him to life in the Department of Corrections on the merged counts and to four-year terms on the two menacing counts (Exhibits A, J).

Woods filed a direct appeal of his conviction in Court of Appeals Case No. 87CA273. The Court of Appeals affirmed the conviction on May 4, 1989. Wood sought certiorari review in the Colorado Supreme Court, which was denied on October 23, 1989. The mandate was issued on December 13, 1989 (Exhibits A, J).

In 1994, Wood filed a pro se petition for writ of habeas corpus in the United States District Court, which was denied on August 1, 1994, on the basis that Wood had not exhausted his claims in the state courts (Exhibit B).

On June 29, 1995, Wood filed a motion for appointment of counsel, an affidavit of indigency, and a motion "to vacate judgment of conviction and sentence" in the state district court (Exhibit C). The district court granted his request for the appointment of counsel in December 1995 (Exhibits C, D). It does not appear, however, that the trial court ruled on the postconviction motion or that Wood requested a ruling (Exhibit D).

Over nine years later, on August 30, 2004, Wood filed a postconviction motion seeking to vacate his convictions on several grounds (Exhibit E). The district court denied the motion (Exhibit E). Wood appealed, and the Colorado Court of Appeals affirmed the district court's order in *People v. Patrick K. Wood*, (Colo. App. No. 04CA2252, Aug. 3, 2006) (not selected for publication) (Exhibits G, H, I, J). Wood sought certiorari review in the Colorado Supreme Court, which was denied on February 5, 2007 (Exhibits K, L).

The instant federal habeas petition was filed on February 5, 2008.

IV. Federal Habeas Petition: Claims Raised

Wood raises two claims in his federal habeas petition:[1]

- Convicting him of both felony murder and second degree murder of the same victim violates double jeopardy principles.
- His waiver of his right to a jury trial on the murder counts was involuntary because the trial judge accepted his waiver without ensuring that it was knowingly and voluntarily made.

V. AEDPA Statute of Limitations

Under 28 U.S.C. § 2244(d), a one-year limitations period applies to applications for writ of habeas corpus. As noted in the pre-answer response, the Respondents are not challenging, but do not concede, the timeliness of the petition. The Respondents hereby incorporate the arguments raised in the pre-answer response into this answer.

---

[1] Wood originally filed a petition including five claims and a sub-claim, but claims 1(b), 3, 4, and 5 were dismissed following the pre-answer proceedings.

VI. Exhaustion of State Remedies and Procedural Default

In order to obtain federal habeas review of a claim that he is in state custody in violation of the Constitution, a state prisoner must exhaust the remedies available in state court. 28 U.S.C. § 2254(b), (c); *Demarest v. Price,* 130 F.3d 922, 932 (10th Cir. 1997).

Following the pre-answer proceedings, this Court determined that Wood had properly exhausted claims 1(a) and 2. The Respondents incorporate by reference those arguments as to exhaustion made in the pre-answer response regarding claim 2.

Regarding claim 1(a)—Wood's claim that convicting him of both second degree murder and felony murder violates double jeopardy principles—the state courts rejected this claim, as required by Colo. R. Crim. P. 35(c)(3)(VI)-(VII), because it was not raised on direct appeal. A state's application of a procedural bar forecloses federal habeas review, *Coleman v. Thompson,* 501 U.S. 722, 731 (1991), if it is an independent and adequate state ground, such that the procedural bar "relies on state law, rather than federal law, as the basis for the decision" and is "strictly or regularly followed and applied evenhandedly to all similar claims." *Hickman v. Spears,* 160 F.3d 1269, 1271 (10th Cir. 1998) (quoting cases).

The state courts' exclusive reliance on the state rule demonstrates that the state procedural ground is independent. Further, although Colo. R. Crim. P. 35(c)(3)

(VII) is relatively new, the Colorado appellate courts have recognized that it is appropriate to apply it to claims raised in postconviction motions, like this one, that are filed after subsection (3)(VII) took effect on July 1, 2004. *See Dunlap v. People*, 173 P.3d 1054, 1062, fn.4 (Colo. 2007); *People v. Walton*, 167 P.3d 163, 167, 169 (Colo. App. 2007); *People v. Versteeg*, 165 P.3d 760, 763 (Colo. App. 2006).

Thus, this Court is precluded from considering claim 1(a) unless Wood can demonstrate cause and prejudice or a fundamental miscarriage of justice. *See Klein v. Neal*, 45 F.3d 1395, 1400 (10th Cir. 1995). Examples include "a showing that the factual or legal basis for a claim was not reasonably available to counsel or that some interference by officials made compliance impracticable." Id. (internal quotation marks omitted). To come within the "very narrow exception" of miscarriage of justice, applicant must supplement his habeas claim with a colorable showing of factual innocence. *Id.* Wood fails to do that. As such, habeas review of claim 1(a) is barred. *Id.*

VII. Review of Habeas Claims on their Merits

A. Standard of Review

Under the Antiterrorism and Effective Death Penalty Act of 1996, habeas corpus relief should not be granted with respect to a claim adjudicated on the merits in the state court proceedings unless the adjudication of the claim: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d). The AEDPA increases the deference to be paid by the federal courts to the state court's factual findings and legal determinations. *Hochin v. Zavaras*, 107 F.3d 1465, 1470 (10th Cir. 1997).

A state court decision is "contrary to" clearly established federal law if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the state court decides a case differently on a set of materially indistinguishable facts. *Penry v. Johnson*, 532 U.S. 782, 792-93 (2001). To be based on an unreasonable application of clearly established federal law, a state court decision must be objectively unreasonable -not merely erroneous, incorrect, or contrary to what a federal court might decide on direct appeal. *See Bell v. Cone*, 535 U.S. 685, 694 (2002); *Williams v. Taylor*, 529 U.S. 362, 410-411 (2000).

Wood's petition demonstrates no grounds for relief under these standards. Here, the Colorado Court of Appeals employed reasonable legal standards that were not contrary to any established United States Supreme Court decisions, and reached conclusions that were supported by the record.

B. Analysis of Claims

As indicated above, Wood raised two claims in his habeas petition that this Court has deemed exhausted. Each claim will be discussed in turn.

Wood first asserts that convicting him of both felony murder and second-degree murder of the same victim violates double jeopardy principles.

The claim fails. Although Wood was found guilty of felony murder and second degree murder, the trial court merged the second degree murder conviction (and the robbery conviction) into his felony murder conviction. Thus, Wood is not being punished twice for the same offense. *See North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), *overruled in part by Alabama v. Smith*, 490 U.S. 794 (1989) (Double Jeopardy Clause protects a defendant against multiple punishments for the same offense).

Woods next asserts that his waiver of his right to a jury trial on the murder counts was involuntary because his attorney failed to inform him of the consequences of his waiver and because the trial judge accepted his waiver without ensuring that it was knowingly and voluntarily made.

A defendant is entitled to jury trial, but he may waive that right so long as he does so knowingly, voluntarily, and intelligently. *See e.g. United States v. Robertson*, 45 F.3d 1423, 1431-32 (10th Cir. 1995).

Here, the Court of Appeals rejected Wood's claim because the record shows that his jury trial waiver was valid (Exhibit J). The court file contains a written jury trial waiver, which bears Wood's signature. The waiver states, in relevant part:

Appendix M

I, Patrick Wood, having been advised of my constitutional right to a trial to a jury of twelve as well as the statutory right to a jury ... hereby waive my right to a jury and agree to have the matter tried to the Court. I understand the following rights:

1. I am charged in the above-captioned action with, among other things, first degree murder (two counts).

2. There has previously been a jury trial in this action and the jury was hopelessly deadlocked and a mistrial was declared at my insistence.

3. I understand that my waiver of jury must be voluntary meaning not the result of any promise, threat or coercion but rather that the waiver is the result of talking this matter over with my attorney, thinking about it and making my own decision to waive the jury in the above-captioned action.

4. It is the advice of my counsel that a jury be waived and the matter tried to the Court but I understand that it is completely my decision whether to have the fact finder in my case be a judge or a jury.

5. After thought and consultation with my lawyer and my family, I voluntarily ask this

> Court to receive my waiver of a jury and ask the Judge to be the fact finder in this case.

(Exhibit M). In addition, a minute order from January 5, 1987—the day Wood's signed the waiver—states: "COURT HEARS STATEMENTS OF COUNSEL & DEFENDANT. DEFENDANT SIGNS WAIVER OF RIGHT TO JURY TRIAL" (Exhibits H, J).

Thus, the Colorado Court of Appeals resolved this claim in a way that was neither 1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," nor 2) based on "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). As such, federal habeas relief is not warranted.

VII. Exhibits

Copies of the following documents have been submitted to the United States District Court as exhibits:

EXHIBIT A:	Colorado Court of Appeals Opinion in 87CA0273 (direct appeal).
EXHIBIT B:	Recommendation of United States Magistrate Judge, and Memorandum Opinion and Order in 94-K-219.

EXHIBIT C:	1995 motion for appointment of counsel, motion for postconviction relief, affidavit of indigency, and order denying postconviction relief.
EXHIBIT D:	Lexis/Nexis Register of Actions, 86CR123.
EXHIBIT E:	2004 motion for postconviction relief.
EXHIBIT F:	State district court's order denying postconviction relief.
EXHIBIT G:	Opening Brief in 04CA2252.
EXHIBIT H:	Answer Brief in 04CA2252.
EXHIBIT I:	Reply Brief in 04CA2252.
EXHIBIT J:	Colorado Court of Appeals Opinion in 04CA2252.
EXHIBIT K:	Denial of Petition for Rehearing.
EXHIBIT L:	Petition for Writ of Certiorari, and Mandate.
EXHIBIT M:	Wood's written waiver of jury trial.

IV. Conclusion

For the reasons set forth above, the application for a writ of habeas corpus should be denied.

JOHN W. SUTHERS
Attorney General

/s/
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* * * *

[EXHIBITS NOT INCLUDED.]

APPENDIX N — District Court Order Denying 28 U.S.C. § 2254 Application, Filed July 6, 2009

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Wiley Y. Daniel

Civil Action No. 08-cv-00247-WYD

PATRICK WOOD,

Applicant,

v.

KEVIN MILYARD, Warden, Sterling Correctional Facility, and THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents.

ORDER DENYING 28 U.S.C. § 2254 APPLICATION

Applicant, Patrick Wood, is a prisoner in the custody of the Colorado Department of Corrections (DOC) who currently is incarcerated at the Sterling, Colorado, correctional facility. On February 5, 2008, Mr. Wood filed *pro se* an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He paid the $5.00 filing fee.

In the application, Mr. Wood asserted five claims: (1) (a) that convicting him of both felony murder and second-degree murder of the same victim and of aggravated robbery violates double jeopardy principles and (b) that convicting him of aggravated robbery and then using that offense as the predicate offense for the felony murder conviction violates double jeopardy principles; (2) that the waiver of his right to a jury trial on the murder counts was involuntary because defense counsel's advisement was inadequate and because the trial judge accepted his waiver without ensuring that it was made knowingly and voluntarily; (3) that his convictions were obtained in violation of his right not to incriminate himself, i.e., defense counsel advised him to testify at trial, which caused him to incriminate himself; (4) that his convictions were the result of ineffective assistance of both trial and appellate counsel, and specifically that trial counsel "was ineffective for advising [him] to waive his right to a second jury trial" and to "waive his right against self incrimination," in "failing to advocate on [his] behalf, and in failing to "move for the 1st Degree Felony Murder to be stricken from the trial judge's consideration" at the bench trial "or at least in the alternative in failing to accurately replay the implications of the felony murder statute to [him]" and "in failing to identify obvious and key issues on direct appeal," see application at 6a; and (5) that the felony murder statute violates equal protection principles because "it disproportionately imposes the same punishment on one who commits a murder with premeditation after deliberation, as on one who has no intent to kill whatsoever and accidentally does so during the course of a felony." *See* application at 6a – 6b.

Appendix N

I. *Federal Court Proceedings*

On January 26, 1994, Mr. Wood filed a habeas corpus application in this court. On March 22, 1995, the Honorable John L. Kane accepted and adopted the August 1, 1994, recommendation of former Magistrate Judge Richard M. Borchers; denied the application for failure to exhaust state remedies; and dismissed the action. *See Wood v. Furlong*, No. 94-cv-00219-JLK (D. Colo. Mar. 22, 1995).

On February 5, 2008, Mr. Wood filed *pro se* the instant habeas corpus application. In an order filed on May 29, 2008, Magistrate Judge Boyd N. Boland ordered the respondents to file within twenty days a pre-answer response limited to addressing the affirmative defenses of timeliness under 28 U.S.C. § 2244(d) and/or exhaustion of state court remedies under 28 U.S.C. § 2254(b)(1)(A). On June 17, 2008, the respondents filed their pre-answer response asserting that the instant action was subject to dismissal as a mixed petition containing both exhausted and unexhausted claims. On July 7, 2008, Mr. Wood filed a reply to pre-answer response.

Magistrate Judge Craig B. Shaffer reviewed the pre-answer response, the reply, and the relevant appellate court briefs, and agreed that claims 1(b), 3, 4, and 5 did not appear to have been exhausted. Therefore, in an order filed on August 15, 2008, Magistrate Judge Shaffer directed Mr. Wood to show cause within thirty days why the application should not be denied as a mixed petition. Alternatively, the magistrate judge informed Mr. Wood that rather than have the court dismiss the application as a mixed petition, he would be allowed to dismiss voluntarily the unexhausted claims and proceed on the exhausted claims.

On September 15, 2008, Mr. Wood submitted his response titled "Objection to Finding of Unexhausted Claims, and Motion to Dismiss Voluntarily Claims Deemed Unexhausted and to Proceed on Exhausted Claims." In the September 15 response, Mr. Wood moved to dismiss voluntarily unexhausted claims 1(b), 3, 4, and 5, and asked only to proceed on exhausted claims 1(a) and 2. In an order filed on September 22, 2008, Senior Judge Zita L. Weinshienk construed Mr. Wood's objection to the finding of unexhausted claims as filed pursuant to 28 U.S.C. § 636(b)(1)(A), overruled the objection, granted Mr. Wood's motion for voluntary dismissal, dismissed unexhausted claims 1(b), 3, 4, and 5, and allowed Mr. Wood to proceed only on exhausted claims 1(a) and (2). On September 22, 2008, the action was reassigned to me.

On October 2, 2008, I ordered the respondents to file an answer on or before October 31, 2008. On October 30, 2008, the respondents filed their answer. On April 14, 2009, I ordered the respondents to provide me with the record from the state court trial. On April 20, 2009, the respondents provided the state court trial record.

I must construe liberally any filings by Mr. Wood because he is not represented by an attorney. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). However, I should not be an advocate for a *pro se* litigant. *See Hall*, 935 F.2d at 1110. For the reasons stated below, I will review the remaining claims 1(a) and (2) on the merits, dismiss them as meritless, and deny the instant application.

II. *State Court Proceedings*

In 1986, Mr. Wood was charged in Adams County District Court Criminal Action No. 86CR123 with first-degree murder after deliberation, first-degree murder felony murder (felony murder), aggravated robbery, and two counts of felony menacing for shooting and killing the assistant manager of a pizza delivery store in Westminster, Colorado. A jury found him guilty of the aggravated robbery and felony menacing counts, but was unable to reach a verdict on the murder counts. In exchange for withdrawing the death penalty from consideration, Mr. Wood waived his right to a jury trial on the murder counts and, at a subsequent bench trial, the trial court found him guilty of felony murder and second-degree murder. During sentencing on January 21, 1987, the trial court merged the murder and aggravated robbery counts, and sentenced him to the DOC for forty years to life on the merged counts and to four-year terms on the two menacing counts, to run concurrently with the life sentence.

On May 4, 1989, Mr. Wood's convictions were affirmed on direct appeal. *See People v. Wood*, No. 87CA0273 (Colo. Ct. App. May 4, 1989) (not published). On October 23, 1989, the Colorado Supreme Court denied certiorari review. On June 29, 1995, Mr. Wood filed in state court a motion for appointment of counsel, an affidavit of indigency, and a motion to vacate judgment of conviction and sentence. *See* answer, ex. C; *see also* answer, ex. D, register of actions at 12. However, despite the fact that on October 30, 1995, Mr. Wood filed a request for a ruling on the previously filed motions, the trial court apparently only ruled on the motion for appointment of counsel, granting it on December 1, 1995. *See* answer, ex. D, register of actions at 12.

On August 19, 2004, Mr. Wood filed a postconviction motion pursuant to Rule 35(c) of the Colorado Rules of Criminal Procedure, which the trial court denied on September 3, 2004. On August 3, 2006, the Colorado Court of Appeals affirmed. *See People v. Wood*, No. 04CA2252 (Colo. Ct. App. Aug. 3, 2006) (not published). On February 5, 2007, the Colorado Supreme Court denied certiorari review. On February 5, 2008, Mr. Wood filed *pro se* the instant habeas corpus application in this court.

III. *Standard of Review on the Merits*

Title 28 U.S.C. § 2254(d) provides that a writ of habeas corpus may not be issued with respect to any claim that was adjudicated on the merits in state court unless the state court adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light

> of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

Claims of legal error and mixed questions of law and fact are reviewed pursuant to 28 U.S.C. § 2254(d)(1). *See Cook v. McKune*, 323 F.3d 825, 830 (10th Cir. 2003). The threshold question pursuant to § 2254(d)(1) is whether Mr. Wood seeks to apply a rule of law that was clearly established by the Supreme Court at the time his conviction became final. *See Williams v. Taylor*, 529 U.S. 362, 390 (2000). Clearly established federal law "refers to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." *Id.* at 412. Furthermore,

> clearly established law consists of Supreme Court holdings in cases where the facts are at least closely-related or similar to the case *sub judice*. Although the legal rule at issue need not have had its genesis in the closely-related or similar factual context, the Supreme Court must have expressly extended the legal rule to that context.

House v. Hatch, 527 F.3d 1010, 1016 (10th Cir. 2008).

If there is no clearly established federal law, that is the end of my inquiry pursuant to 28 U.S.C. § 2254(d)(1). *See id.* at 1018. If a clearly established rule of federal law is implicated, I must determine whether the state court's decision was contrary to or an unreasonable application of that clearly established rule of federal law. *See Williams*, 529 U.S. at 404-05.

> A state-court decision is contrary to clearly established federal law if: (a) "the state court applies a rule that contradicts the governing law set forth in Supreme Court cases"; or (b) "the state court confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a result different from [that] precedent." *Maynard* [*v. Boone*], 468 F.3d [665,] 669 [(10th Cir. 2006)] (internal quotation marks and brackets omitted) (quoting *Williams*, 529 U.S. at 405). "The word 'contrary' is commonly understood to mean 'diametrically different,' 'opposite in character or nature,' or 'mutually opposed.'" *Williams*, 529 U.S. at 405 (citation omitted).
>
> A state court decision involves an unreasonable application of clearly established federal law when it identifies the correct governing legal rule from Supreme Court cases, but unreasonably applies it to the facts. *Id.* at 407-08. Additionally, we have recognized that an unreasonable application may occur if the state court either unreasonably extends, or unreasonably refuses to extend, a legal principle from Supreme Court precedent to a new context where it should apply.

House, 527 F.3d at 1018.

My inquiry pursuant to the "unreasonable application" clause is an objective inquiry. *See Williams*, 529 U.S. at 409-10. "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather that application must also be unreasonable." *Id.* at 411. "[A] decision is 'objectively unreasonable' when most reasonable jurists exercising their independent judgment would conclude the state court misapplied Supreme Court law." *Maynard*, 468 F.3d at 671. "[O]nly the most serious misapplications of Supreme Court precedent will be a basis for relief under [28 U.S.C.] § 2254." *Id.*

Claims of factual error are reviewed pursuant to 28 U.S.C. § 2254(d)(2). *See Romano v. Gibson*, 278 F.3d 1145, 1154 n.4 (10th Cir. 2002). Section 2254(d)(2) allows me to grant a writ of habeas corpus only if the state court decision was based on an unreasonable determination of the facts in light of the evidence presented. Pursuant to § 2254(e)(1), I must presume that the state court's factual determinations are correct and Mr. Wood bears the burden of rebutting the presumption by clear and convincing evidence. "The standard is demanding but not insatiable . . . [because] '[d]eference does not by definition preclude relief.'" *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003)).

I "owe deference to the state court's result, even if its reasoning is not expressly stated." *Aycox v. Lytle*, 196 F.3d 1174, 1177 (10th Cir. 1999). Therefore, I "must uphold the state court's summary decision unless [my] independent review of the record and pertinent federal law persuades [me] that its result contravenes or unreasonably applies clearly established federal law, or is based on an unreasonable determination of the facts in light of the evidence presented." *Id.* at 1178. "[T]his 'independent review' should be distinguished from a full de novo review of the petitioner's claims." *Id.*

Finally, if the state court does not address a claim on the merits, I must review the claim *de novo* and the deferential standards in 28 U.S.C. § 2254(d) are not applicable. *See Gipson v. Jordan*, 376 F.3d 1193, 1196 (10th Cir. 2004).

IV. *Claims*

Only remaining claims 1(a) and 2 currently are before me. I initially will address Mr. Wood's claim 1(a) that convicting him of both felony murder and second-degree murder of the same victim and of aggravated robbery violates double jeopardy principles. Upon current briefing, it appears that claim 1(a) may be procedurally defaulted. Because this court already stated that the issue of exhaustion would not be addressed further and because claim 1(a) previously was determined to have been exhausted, I feel compelled, in the interest of fairness to Mr. Wood, to address claim 1(a) on the merits. *See Cannon v. Mullin*, 383 F.3d 1152, 1159 (10th Cir. 2004) (When questions of procedural bar are problematic, and the substantive claim can be disposed of readily, a federal court may exercise its discretion to bypass the procedural issues and reject a habeas claim on the merits.) (citing *Romero v. Furlong*, 215 F.3d 1107, 1111 (10th Cir. 2000)). Because the state courts did not address the merits of the federal habeas corpus claim Mr. Wood raises here, I will exercise my own independent judgment in deciding the claim. *See Gipson*, 396 F.3d at 1196.

In his motion to vacate judgment of conviction and sentence filed on June 29, 1995 Mr. Wood asserted that convicting him of both felony murder and second-degree murder of the same victim violates double jeopardy principles, a claim which the state courts never addressed on the merits. In addition to the claim Mr. Wood raised in his 1995 postconviction motion, Mr. Wood also argues before me that convicting him of aggravated robbery violates double jeopardy principles, as well. Specifically, he alleges that:

> Petitioner was convicted of both 1st Degree Felony Murder, and 2nd Degree Felony Murder and Aggravated Robbery, which violates principles of Double Jeopardy, and resulted in conviction of two separate murder counts for a single victim, and in being twice convicted for Aggravated Robbery, as an underlying felony for the Felony Murder count and separate as its own charge.

Application at 5.

A person may be prosecuted for more than one crime based on the same conduct if each crime requires proof of a fact that the other does not. *Blockburger v. United*

States, 284 U.S. 299, 304 (1932); *United States v. Pearson*, 203 F.3d 1243, 1267-68 (10th Cir. 2000).

I have reviewed the versions of the relevant Colorado statutes in effect at the time Mr. Wood was charged and convicted. A person committed the crime of murder in the first degree, felony murder, a class one felony, if "[a]cting either alone or with one or more persons, he commits or attempts to commit . . . robbery. . . and, in the course of or in furtherance of the crime that he is committing or attempting to commit, or of immediate flight therefrom, the death of a person, other than one of the participants, is caused by anyone." Colo. Rev. Stat. § 18-3-102(1)(b) (1978 Repl. Vol.). A person committed second-degree murder, a class two felony, if he "causes the death of a person knowingly, but not after deliberation." Colo. Rev. Stat. § 18-3-103(1)(a) (1978 Repl. Vol.). A person who committed robbery was guilty of aggravated robbery, a class three felony, if "during the act of robbery or immediate flight therefrom [h]e . . . by the use of force, threats, or intimidation with a deadly weapon knowingly puts the person robbed or any other person in reasonable fear of death or bodily injury." Colo. Rev. Stat. § 13-4-302(1)(b) (1978 Repl. Vol.).

After review of the relevant Colorado statutes in effect in Colorado at the time Mr. Wood was charged and convicted, I find it clear that the crimes of felony murder, second-degree murder, and aggravated robbery require different proof and are separate and distinct crimes. Therefore, I find that Mr. Wood's convictions for the crimes at issue do not violate *Blockburger*.

As his second claim, Mr. Wood alleges that the waiver of his right to a jury trial on the murder counts was involuntary because defense counsel's advisement was inadequate and because the trial judge accepted his waiver without ensuring that it was made knowingly and voluntarily. A defendant is entitled to a jury trial, but he may waive that right so long as he does so knowingly, voluntarily, and intelligently. *See, e.g., United States v. Robertson*, 45 F.3d 1423, 1431-32 (10th Cir. 1995) (citing *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 275 (1942), and *Patton v. United States*, 281 U.S. 276, 312 (1930). Specifically, a defendant may waive his Sixth Amendment right to a jury trial when: (1) he gives "express, intelligent consent"; (2) the government consents; and (3) the waiver is "approved by the responsible judgment of the trial court." *Adams*, 317 U.S. at 277-78. The adequacy of a jury trial waiver is a mixed question of law and fact. *United States v. Farris*, 77 F.3d 391, 396 (11th Cir. 1996). Mixed questions of law and fact are reviewed pursuant to § 2254(d)(1). *See Cook*, 323 F.3d at 830.

The state court record contains a written jury trial waiver, dated January 5, 1987, bearing Mr. Wood signature. The waiver states, in relevant part:

> I, Patrick Wood, having been advised of my constitutional right to a trial to a jury of twelve as well as the statutory right contained in C.R.S. 18-1-406, hereby waive my right to a jury and agree to have the matter tried to the Court. I understand the following rights:

> 1. I am charged in the above-captioned action with, among other things, first degree murder (two counts).
>
> 2. There has previously been a jury trial in this action and the jury was hopelessly deadlocked and a mistrial was declared at my insistence.
>
> 3. I understand that my waiver of jury must be voluntary meaning not the result of any promise, threat or coercion but rather that the waiver is the result of talking this matter over with my attorney, thinking about it and making my own decision to waive the jury in the above-captioned action.
>
> 4. It is the advice of my counsel that a jury be waived and the matter tried to the Court but I understand that it is completely my decision whether to have the fact finder in my case be a judge or a jury.
>
> 5. After thought and consultation with my lawyer and my family, I voluntarily ask this Court to receive my waiver of a jury and ask the Judge to be the fact finder in this case.

Answer, ex. M, waiver of jury trial; *see also* trial tr., vol. I at 187, Jan. 5, 1987.

A minute order from January 5, 1987, the day Mr. Wood signed the waiver, states, in pertinent part:

COURT HEARS STATEMENTS OF COUNSEL & DEFENDANT. DEFENDANT SIGNS WAIVER OF RIGHT TO JURY TRIAL. DDA WAIVES PEOPLE'S RIGHT TO JURY TRIAL.

Trial tr., vol. I at 274, Jan. 5, 1987.

The Colorado Court of Appeals in No. 04CA2252 rejected Mr. Wood's claim because the record clearly showed that his jury trial waiver was valid:

> Here, defendant admits that he signed a written waiver of his right to a jury trial but asserts that it is not valid because he was not "personally questioned by the district court assuring that the waiver was voluntary, knowing and intelligently entered." However, the record contains defendant's written waiver form and a minute order indicating, "[C]ourt hears statements of counsel and defendant. Defendant signs waiver of right to jury trial. DDA waives People's right to jury trial."

Answer, ex. J, No. 04CA2252, slip op. at 6.

I find that the decision of the state appeals court that Mr. Wood's jury trial waiver was knowing, voluntary, and intelligent did not result in a decision that was contrary to, or involved an unreasonable application of, clearly established federal Supreme Court law. *See* 28 U.S.C. § 2254(d)(1).

V. *Conclusion*

For the reasons stated above, habeas corpus relief will be denied. Accordingly, it is

ORDERED that the remaining claims 1(a) and (2) are dismissed as meritless, the habeas corpus application is denied, and the action is **DISMISSED WITH PREJUDICE**. It is

FURTHER ORDERED that each party shall bear his own costs and attorney's fees.

Dated: July 6, 2009.

BY THE COURT:

/s/
Wiley Y. Daniel
Chief United States District Judge

APPENDIX O — Tenth Circuit Order Granting Certificate of Appealability, Filed January 4, 2010

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 09-1348

(D.C. No. 1:08-CV-00247-WYD) (D. of Colo.)

PATRICK WOOD,

Petitioner-Appellant,

v.

KEVIN MILYARD , Warden Sterling Correctional Facility, and THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents- Appellees.

ORDER

Before **TYMKOVICH**, Circuit Judge.

Patrick Wood, a state prisoner acting pro se,[1] filed an application for a writ of habeas corpus in United States District Court. The court denied relief, and Wood now seeks permission to appeal.

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[1] Because he proceeds pro se, we construe Wood's filings liberally. *Freeman v. Watkins*, 479 F.3d 1257, 1259 (10th Cir. 2007).

This case concerns a conviction under Colorado law that became final twenty years ago. Wood has filed numerous actions in state and federal court since that time, and his petition presents several complex procedural and substantive issues. Exercising jurisdiction under 28 U.S.C. §§ 1291 and 2253(c), we hold that two of Wood's claims are "adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see Allen v. Zavaras*, 568 F.3d 1197, 1198 (10th Cir. 2009) (granting a COA "on a single, narrow issue").

We therefore GRANT a certificate of appealability (COA) on two issues only: (1) Wood's claim that his simultaneous convictions for felony murder and second degree murder violate his right against double jeopardy under the Fifth and Fourteenth Amendments to the Constitution, and (2) Wood's claim that his decision to waive a jury trial was not "knowing, intelligent, and voluntary." As explained below, we further appoint Wood counsel to assist in arguing his appeal.

In granting a COA on these claims, we recognize they may be subject to dismissal for various procedural reasons. We will analyze these procedural matters further when we hear the substance of Wood's appeal, and we direct the parties to address those matters in their briefing before this court. We DENY a COA as to Wood's remaining claims.

I. Background

A. Wood's Crimes and Convictions in State Court

In 1986, Wood shot and killed the assistant manager of a Colorado pizza delivery store during a botched robbery. He was tried before a jury in state court for his crimes, but the proceedings resulted in a mistrial. On the advice of counsel, he subsequently waived his right to a jury, proceeded with a trial to the bench, and was convicted of various crimes.

With regard to the homicide, Wood was convicted of both first degree felony murder under Colorado Revised Statutes § 18-3-102(1)(b) and second degree murder under Colorado Revised Statutes § 18-3-103. For sentencing purposes, the state court "merged" his two murder convictions and his conviction for armed robbery and sentenced him to a single term of life imprisonment for all three crimes. *See* R. at 150. The two separate murder convictions, however, remain on the state court records.

Wood unsuccessfully completed his direct appeal on October 23, 1989, when the Colorado Supreme Court denied certiorari. Over the past twenty years, Wood has continued to challenge his convictions in state and federal court.

B. Wood's First Federal Habeas Petition and His State Court Petitions for Post-Conviction Relief

In 1994, Wood filed a pro se petition for a writ of habeas corpus in United States District Court, which the court dismissed on the ground that Wood had not exhausted his state court remedies with respect to the constitutional claims he alleged. *See* R. at 122, 125. In 1995, he filed a pro se Motion to Vacate Judgment of Conviction and Sentence in state court. From the docket sheet, it appears that the only action the state court took regarding this post-conviction motion was to appoint Wood counsel. *Id.* at 153. For the eight years following the appointment of counsel, nothing else occurred, and Wood did not request a ruling.

In 2004, Wood revived his state court proceedings when he filed a Petition for Postconviction Relief. *See id.* at 153. This time, however, the petition was ruled upon and disposed of. The court denied all but one of Wood's claims on the ground that they were procedurally defaulted as a matter of state law, either because they were untimely filed or because they violated Colorado Rule of Criminal Procedure 35(c)(3)(VII). That rule denies post-conviction relief for any claim that "could have been presented in an appeal previously brought." The court denied Wood's remaining claim—which alleged ineffective assistance of trial counsel regarding Wood's waiver of his right to a jury trial—on the merits without granting a hearing. R. at 167–69. The Colorado Court of Appeals affirmed, and the Colorado Supreme Court denied certiorari on February 5, 2007. *See id.* at 207–214, 238.

C. The Instant Federal Habeas Application

On February 5, 2008, Wood filed the instant habeas application in United States District Court. Wood presented six constitutional claims, which the district court described as follows:

> (1)(a) that convicting him of both felony murder and second-degree murder of the same victim violates double jeopardy principles and (b) that convicting him of aggravated robbery and then using that offense as the predicate offense for the felony murder conviction violates double jeopardy principles; (2) that the waiver of his right to a jury trial on the murder counts was involuntary because defense counsel's advisement was inadequate and because the trial judge accepted his waiver without ensuring that it was made knowingly and voluntarily; (3) that his convictions were obtained in violation of his right not to incriminate himself, i.e., defense counsel advised him to testify at trial, which caused him to incriminate himself; (4) that his convictions were the results of ineffective assistance of both trial and appellate counsel . . . ; and (5) that the [Colorado] felony murder statute violates equal protection principles . . . .

R. at 251–52 (D. Ct. Dkt., Doc. 17, Aug. 15, 2008 Order to Show Cause).

After the district court ordered briefing from the parties on various procedural matters, Wood voluntarily dismissed four of his claims due to his failure to exhaust state court remedies. Only claims (1)(a) and (2) survived, and the court denied relief on the merits for these remaining claims.

II. Discussion

The district court found that four of Wood's constitutional claims were never properly presented to a state court and were therefore unexhausted. In response, Wood voluntarily dismissed them. We find that the district court's order upholding this voluntary dismissal was neither "debatable" nor "wrong." *Slack*, 529 U.S. at 484. But Wood's remaining claims—(1)(a) and (2)—present difficult procedural and merits questions, and we therefore grant a COA as to those claims.

A. Failure to Exhaust State Court Remedies

The district court determined that claims (1)(b), (3), (4), and (5) were unexhausted under 28 U.S.C. § 2254(b)(1)(A) and consequently ordered Wood to "show cause . . . why the habeas corpus application should not be denied as a mixed petition." R. at 253 (D. Ct. Dkt., Doc. 17, Aug. 15, 2008 Order to Show Cause). As an alternative to dismissal of the petition in its entirety, the court also provided Wood the option to "dismiss voluntarily the unexhausted claims and proceed with the exhausted claims." *Id.*; *see also Fairchild v. Workman*, 579 F.3d 1134, 1156 (10th Cir. 2009) (noting that when faced with a mixed habeas petition, the district court may allow the petitioner to "dismiss the unexhausted claims and proceed with the exhausted claims" (quoting *Harris v. Lafler*, 553 F.3d 1028, 1031 (6th Cir. 2009))).

Wood chose the latter course. Although he maintained he had properly exhausted all of his constitutional claims, Wood informed the district court that he "hereby dismisses voluntarily the claims that are deemed unexhausted, and wishes to proceed on his exhausted claims." R. at 259 (D. Ct. Dkt., Doc. 18). The court accepted this decision and dismissed claims (1)(b), (3), (4), and (5). *See* R. at 267 (D. Ct. Dkt., Doc. 19, Sept. 22, 2008 Order).

In seeking a COA, Wood "maintains that it was error for the district Court to rule that his other Habeas Corpus Claims were not exhausted." Pet'r Opening Br. at 10. Wood, however, is bound by his decision to dismiss his unexhausted claims, notwithstanding his pro se status. *See Tapia v. Lemaster*, 172 F.3d 1193, 1196 (10th Cir. 1999) ("Mr. Tapia argues that he should not be held accountable for the decision to pursue only the exhausted claims because he was pro se. . . . Mr. Tapia's pro se status does not justify reconsideration of the choice he made in his prior habeas matter." (internal citation omitted)).

Wood has therefore failed to show that the district court's decision to dismiss his unexhausted claims—at Wood's own request—was debatable or wrong. *See Coppage v. McKune*, 534 F.3d 1279, 1281 (10th Cir. 2008) (setting forth the standard for granting a COA to review a procedural ruling). We deny him a COA as to claims (1)(b), (3), (4), and (5).[2]

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[2] It appears Wood presented a version of claim (5) to the Colorado District Court in his August 19, 2004 Petition for Postconviction Relief. *See* R. at 163–65. In claim (5), Wood asserts the Colorado felony murder statute under which he was convicted violates Fourteenth Amendment equal protection principles because it "disproportionately imposes the same punishment on one who commits a murder with premeditation . . . on one who

B. Wood's Remaining Claims

After the voluntary dismissal, only two of Wood's claims remain. In claim (1)(a), Wood asserts his simultaneous convictions for felony murder and second degree murder violate his right against double jeopardy under the Fifth and Fourteenth Amendments to the Constitution. In claim (2), Wood asserts that the waiver of his jury trial rights was unconstitutional because it was based upon "improper and erroneous" advice on the part of his trial counsel and his trial judge did not independently assess the adequacy of his waiver.

As an initial matter, both of these claims might be subject to dismissal due to the potential untimeliness of Wood's application for habeas corpus. Moreover, the claims might also be barred from our consideration—at least in part—due to an independent and adequate state

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has no intent to kill whatsoever." *Id.* at 11–12 (Application for a Writ of Habeas Corpus). This claim, however, is clearly without merit. *See Ragland v. Hundley*, 79 F.3d 702, 706 (8th Cir. 1996) ("Ragland . . . argues that his equal protection rights are violated by the felony-murder doctrine. He argues that felony murder itself amounts to an impermissible classification because only felony murderers are liable for murders that they did not intentionally aid and abet. . . . [I]t is perfectly rational and permissible for a state to equate knowing participation in [the underlying] felonies with . . . the murders which foreseeably ensue." (footnote omitted)). We therefore deny a COA on claim (5) on the alternative ground that it lacks merit. *See Davis v. Roberts*, 425 F.3d 830, 834 (10th Cir. 2005) (holding that we may deny a COA "on any ground adequately supported by the record" (quoting *Elkins v. Comfort*, 392 F.3d 1159, 1162 (10th Cir. 2004))).

procedural rule. The district court did not address these procedural matters and instead decided claims (1)(a) and (2) on the merits, although the claims present difficult legal questions. We therefore grant a COA as to claims (1)(a) and (2).

1. *Untimeliness*

Soon after Wood filed the instant habeas application, the district court ordered him to "show cause why the application should not be denied as timebarred" under the limitations period of the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2244(d). R. at 40 (D. Ct. Dkt., Doc. 2, Feb. 19, 2008 Order to Show Cause). Wood complied with this order and filed a lengthy response.

In his response to the show cause order, Wood implied that his 1995 Motion to Vacate Judgment of Conviction and Sentence, which he filed in state court, tolled the AEDPA statute of limitations under § 2244(d)(2) and *Carey v. Saffold*, 536 U.S. 214 (2002). *See* R. at 50–52 (D. Ct. Dkt., Doc. 3, March 20, 2008 Resp. to Show Cause Order). Section 2244(d)(2) states that the AEDPA statute of limitations is tolled while "a properly filed application for State post-conviction or other collateral review . . . is *pending*." (emphasis added). *Carey* held that a state application for post-conviction review remains "pending" under § 2244(d)(2) "until the application has achieved final resolution through the State's post-conviction procedures." 536 U.S. at 220. The district court rejected these arguments, holding that "[i]t is clear on the face of the [habeas] application that this action is time-barred." R. at 73 (D. Ct. Dkt., Doc. 5, Apr. 3, 2008 Order of Dismissal).

Wood subsequently filed a motion to reconsider, restating his arguments regarding the timeliness of his federal habeas application. *See* R. at 82 (D. Ct. Dkt., Doc. 9). The court did not address the substance of any of these arguments, but nonetheless granted the motion to reconsider. *See* R. at 92–93 (D. Ct. Dkt., Doc. 11, May 22, 2008 Order). The court then ordered the respondent to file a Pre-Answer Response to address timeliness under § 2244(d) and exhaustion of state court remedies under § 2254(b)(1)(A). *See* R. at 95 (Pre-Answer Response). But again, the court never addressed or analyzed the issue of timeliness under AEDPA; as discussed above, Wood voluntarily dismissed his unexhausted claims, and the district court proceeded to adjudicate the merits of the remaining claims.

It is therefore an open question whether Wood's current habeas application was timely filed under AEDPA. Wood's conviction became final in 1990, after the Colorado Supreme Court denied certiorari to review his direct appeal and Wood failed to seek review in the United States Supreme Court. *See Hall v. Scott*, 292 F.3d 1264, 1266 (10th Cir. 2002). And although Wood filed a federal petition for habeas corpus in 1994—prior to AEDPA's 1996 effective date—the instant application was filed in 2008 and is clearly subject to AEDPA's limitations period. *See May v. Workman*, 339 F.3d 1236, 1237 (10th Cir. 2003) (citing § 2244(d)(1) and *Fisher v. Gibson*, 262 F.3d 1135, 1142 (10th Cir. 2001)).

Moreover, it appears Wood took no action in state court to pursue his 1995 Motion to Vacate Judgment of Conviction and Sentence. Indeed, after the state court appointed counsel for Wood, the next two docket entries in the state court records relating to Wood are a letter from Wood to the court and Wood's petition for post-conviction relief—both of which he filed pro se in 2004, nine years after the court appointed counsel to pursue his 1995 motion. *See* R. at 153. Wood's apparently dilatory behavior calls into question his eligibility for the tolling provision of § 2244(d)(2) and his eligibility for equitable tolling. *See May*, 339 F.3d at 1237 (holding that merely filing requests for documents in state court does not toll the AEDPA limitations period under § 2244(d)(2)); *Gibson v. Klinger*, 232 F.3d 799, 807 (10th Cir. 2000) (holding that state prisoners are not allowed to toll the AEDPA limitations period "indefinitely" by "beginning a [state legal] process and abandoning it"); *see also Burger v. Scott*, 317 F.3d 1133, 1141 (10th Cir. 2003) (equitable tolling under AEDPA is unavailable unless the petitioner has pursued his claims diligently).

The limitations period contained in AEDPA is central to its purpose of bringing finality to state court criminal judgments. *See Herrera v. Lemaster*, 301 F.3d 1192, 1198 (10th Cir. 2002) ("In enacting AEDPA 'Congress wished to curb delays, to prevent 'retrials' on federal habeas, and to give effect to state convictions to the extent possible under law.'" (quoting *Williams v. Taylor*, 529 U.S. 362, 404 (2000))). And even though the district court did not rely upon the AEDPA limitations period to dispose of Wood's habeas application, we may rely upon it in disposing of his appeal. *See Davis v. Roberts*, 425 F.3d 830, 834 (10th

Cir. 2005) (holding that we may deny habeas relief "on any ground adequately supported by the record" (quoting *Elkins v. Comfort*, 392 F.3d 1159, 1162 (10th Cir. 2004))).

Because the timeliness of Wood's instant habeas application is an important preliminary matter, briefing by the parties on this issue would assist in the determination of this appeal. We therefore order the parties to address the timeliness of Wood's habeas application in their briefing to this court.

2. *Claim (1)(a): Double Jeopardy*

Wood presented his double jeopardy claim to state court in his 2004 petition for post-conviction relief, but the court disposed of the claim on procedural grounds, finding it barred under Colorado Rule of Criminal Procedure 35(c)(3)(VII). *See* R. at 31–32 (*People v. Wood*, No. 04CA2252, Slip. Op. at 4–5 (Colo. Ct. App. Aug. 3, 2006)); *see also* Colo. R. Crim. P. 35(c)(3)(VII) ("The court shall deny any claim that could have been presented in an appeal previously brought or postconviction proceeding previously brought . . . ."). Below, the district court acknowledged the potential procedural default, but nonetheless proceeded to address the merits of Wood's double jeopardy claim. R. at 442 (D. Ct. Dkt., Doc. 25, July 6, 2009 Order) ("Upon current briefing, it appears that claim 1(a) may be procedurally defaulted. . . . [But] I feel compelled, in the interest of fairness to Mr. Wood, to address claim 1(a) on the merits.").[3]

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[3] In his briefing to the district court, Wood argued he had failed to assert his double jeopardy claim on direct appeal—and

Analyzing the claim de novo, the district court held that Wood's simultaneous convictions for first degree felony murder and second degree murder are not a violation of Wood's double jeopardy rights. In the district court's view, because each of the two Colorado murder statutes require proof of a legal element not found in the other, they pass the test articulated by the Supreme Court in *Blockburger v. United States*, 284 U.S. 299 (1932). Thus, according to the district court, Wood's dual murder convictions do not amount to an impermissible multiple punishment.

The test in *Blockburger*, however, is merely a tool to assist federal courts in ascertaining the intent of a legislature—generally, legislatures are not presumed to have authorized multiple punishments for a single offense. *See Missouri v. Hunter*, 459 U.S. 359, 366–68 (1983); *see also White v. Howes*, 586 F.3d 1025, 1031 (6th Cir. 2009); *Lucero v. Kerby*, 133 F.3d 1299, 1316 (10th Cir. 1998). On the other hand, a court does not violate double jeopardy principles when it imposes multiple punishments for a single offense which have been authorized by the relevant legislature. *Lucero*, 133 F.3d at 1316 ("[T]he Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the

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had consequently failed to comply with Colorado Rule of Criminal Procedure 35(c)(3)(VII)—due to the ineffective assistance of his appellate counsel. R. at 48 (D. Ct. Dkt., Doc. 15). He made the same argument to the Colorado courts when his 2004 Petition for Post-Conviction Relief was denied. R. at 171, 176. According to Wood, his appellate counsel's ineffectiveness was cause for his failure to comply with state procedural rules. The district court did not address this contention, but the parties should address it in their briefing to this court.

legislature intended." (quoting *Hunter*, 459 U.S. at 366)). Here, because Wood's convictions were made under state law, we must defer to the decisions of the Colorado Supreme Court in assessing whether Wood's two murder convictions were authorized by the legislature. *See White*, 586 F.3d at 1031; *Lucero*, 133 F.3d at 1316.

Reading his pro se filings generously, Wood contends the Colorado General Assembly did not intend to impose multiple convictions for a single homicide. Wood cites various cases from the Colorado Supreme Court to support this argument. *See People v. Hickam*, 684 P.2d 228, 231 (Colo. 1984) ("[The defendant] was convicted on the first-degree felony murder charge and of the lesser included offense of second-degree murder. A defendant may not be convicted of both .... Accordingly, the second-degree murder conviction is reversed ...."); *People v. Lowe*, 660 P.2d 1261, 1270–71 (Colo. 1983) ("Only one conviction of murder is permitted for the killing of one victim .... It would be a strange system of justice that would permit the defendant to be sentenced to two ... sentences for the killing of one person." (internal citation omitted)); *see also People v. White*, 64 P.3d 864, 876 (Colo. Ct. App. 2002) ("Only one conviction of murder is permitted for the killing of one victim.").

In response, the state argues that prior to sentencing, "the trial court merged the second degree murder conviction ... into the felony murder conviction and imposed a single sentence," and as a result, Wood's double jeopardy rights were not violated. *See* Resp. to Req. for COA at 10. But this argument does not resolve Wood's double jeopardy claim. The Supreme Court has held that a second conviction—even without an additional sentence—violates a defendant's double jeopardy rights when the second conviction has not been authorized by the legislature. *See Ball v. United States*, 470 U.S. 856, 865 (1985) ("Thus, the second conviction, *even if it results in no greater sentence*, is an impermissible punishment." (emphasis added)); *United States v. Hernandez*, 94 F.3d 606, 612 (10th Cir. 1996) ("[T]he district court merged the two charges and imposed no sentence for the conspiracy conviction . . . . However, the court did not vacate the conspiracy *conviction* itself." (emphasis in original)); *cf. United States v. Shorter*, 328 F.3d 167, 173 (4th Cir. 2003) ("[H]ere there is no duplicative conviction to be vacated because the district court merged the duplicative counts *into a single conviction*." (emphasis added)).

Given the relevant case law, Wood has carried his burden to show that the district court's disposition of his double jeopardy claim was "debatable." *Slack*, 529 U.S. at 484. We therefore grant Wood a COA on claim (1)(a). Nonetheless, because Wood failed to raise double jeopardy on direct appeal, and because the state courts found the claim to be procedurally defaulted when Wood presented it in his 2004 petition for post-conviction relief, we direct the parties to brief the question whether the claim is barred from our consideration under the independent and adequate state ground doctrine.

3. Claim (2): Invalid Waiver of Right to Jury Trial

Wood's case was first tried to a jury in state court, which found him guilty of robbery and felony menacing but deadlocked on the murder charges. At Wood's request, the court declared a mistrial. *See* R. at 149, 432. Instead of electing to have his case retried by a jury, Wood agreed to a bench trial in exchange for the prosecution's withdrawal of the death penalty from consideration. *See* Application for COA at 4.

In claim (2), Wood asserts the waiver of his Sixth Amendment right to a jury trial was not "knowing, intelligent, and voluntary," because his trial counsel "improperly and erroneously advised [him] to waive" his rights. Pet'r Opening Br. at 9. Specifically, Wood alleges his trial counsel told Wood he had a "friendly relationship with the trial judge," and on account of this relationship, the judge would be "lenient" and "find [Wood] innocent of the murders." *Id.* at 8–9. Wood styles his challenge to his bench trial as both a claim for ineffective assistance of counsel as well as a claim for an invalid waiver of his constitutional rights. *See* Application for COA at 4.

In state post-conviction proceedings, the Colorado Court of Appeals analyzed the issue under ineffective assistance of counsel standards. *See* R. at 32 (*People v. Wood*, No. 04CA2252, Slip. Op. at 5 (Colo. Ct. App. Aug. 3, 2006)). The court reasoned that, due to Wood's failure to raise the issue on direct appeal, the only cognizable claim Wood could present regarding his jury trial waiver was an ineffective assistance of counsel claim. *See id.* at 31–32; *see also* Colo. R. Crim. P. 35(c)(3)(VIII) ("Notwithstanding (VII) above, the court shall not deny a postconviction claim of ineffective assistance of trial counsel on the ground that all or part of the claim could have been raised on direct appeal.").

Below, however, the district court did not address the issue under ineffective assistance standards, but rather analyzed only whether Wood's waiver was "knowing, voluntary, and intelligent." R. at 444–46 (D. Ct. Dkt., Doc. 25, July 6, 2009 Order). The district court examined a signed waiver Wood submitted to the trial court, in which he asserted his jury trial waiver was "not the result of any promise, . . . but rather that the waiver is the result of talking this matter over with my attorney, thinking about it, and making my own decision to waive the jury." *Id.* at 432. The district court also noted that the state court record contains at least some evidence of a colloquy between Wood and the trial court discussing his decision to waive a jury trial. *See id.* at 445 (D. Ct. Dkt., Doc. 25, July 6, 2009 Order).

Given the procedural history, Wood's jury trial waiver claim is potentially barred from our consideration due to an independent and adequate state procedural rule, namely Colorado Rule of Criminal Procedure 35(c)(3)(VII).[4] His ineffective assistance of counsel claim relating to the jury trial waiver, however, is cognizable in federal habeas because it was addressed and disposed of on the merits in state court.

In light of the district court's failure to address Wood's ineffective assistance of counsel claim, we conclude Wood has shown the district court's disposition of his jury trial waiver claim was "debatable." *Slack*, 529 U.S. at 484. We therefore grant a COA as to claim (2). We direct the parties to address any procedural issues pertinent to this claim in their briefing to the court.

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[4] Again, Wood has argued there is cause for his procedural default, namely that his appellate counsel was ineffective. *See* R. at 48 (D. Ct. Dkt., Doc. 15). The parties should address this issue in their briefing to this court.

III. Conclusion

For the reasons set forth above, we GRANT a COA on claims (1)(a) and (2). We DENY a COA as to the remaining claims asserted in Wood's habeas application.

Additionally, because disposition of this case, and the interests of justice, would be aided by the appointment of counsel, the office of the Federal Public Defender for the Districts of Wyoming and Colorado is appointed to represent Wood on appeal. *See* 18 U.S.C. § 3006A(a)(2)(B). New counsel may borrow the hard copy of the record on appeal maintained in the clerk's office. In addition, the record is available electronically on the court's docket. Within ten days of the date of this order, new counsel shall submit an entry of appearance to this court.

In addition, counsel for Wood shall file a supplemental opening brief as to claims (1)(a) and (2) described above. The brief should specifically address the merits of those claims, as well as the timeliness of Wood's application for writ of habeas corpus under AEDPA and any state procedural rules that might bar our consideration of claims (1)(a) and (2).

Petitioner's supplemental brief addressing the foregoing is due on or before March 5, 2010. Within thirty days after service of petitioner's brief, respondent shall also file a brief addressing the foregoing. Petitioner may file a reply brief within fourteen days of service of respondent's brief if he so desires. All briefs shall be filed and served in compliance with Federal Rules of Appellate Procedure 28 and 31.

Entered for the Court

/s/

Elisabeth A. Shumaker
Clerk of Court

APPENDIX P — Tenth Circuit Order Directing the State to File a Copy of all State Court Postconviction Dockets and Records Regarding Wood's 1995 Postconviction Motion, Filed November 3, 2010

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 09-1348
(D.C. No. 1:08-CV-00247-WYD) (D. Colo.)

PATRICK WOOD,

Petitioner-Appellant,

v.

KEVIN MILYARD, Warden, Sterling Correctional Facility; THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents-Appellees.

ORDER

Patrick Wood appeals from the denial of his 28 U.S.C. § 2254 petition for habeas relief. Respondents-Appellees question in their supplemental answer brief the timeliness of Wood's petition. Specifically, they raise the issue of whether Wood's 1995 motion for state postconviction relief tolled the limitations period for seeking federal habeas relief under the Antiterrorism and Effective Death

Penalty Act (AEDPA). *See Serrano v. Williams*, 383 F.3d 1181, 1183 (10th Cir. 2004) (noting that a federal habeas challenge to a conviction that became final before AEDPA's effective date must have been filed by April 24, 1997, and that a properly filed application for state postconviction relief will extend that date).

The appellate record is silent, however, as to what happened to the 1995 motion in state court.

Accordingly, Respondents-Appellees shall obtain and file in this court, within thirty days of this order's entry, a copy of all state court postconviction dockets and records regarding Wood's 1995 motion.

Entered for the Court

/s/
ELISABETH A. SHUMAKER, Clerk

APPENDIX Q — State's Response to Tenth Circuit Order Directing the State to File a Copy of all State Court Postconviction Dockets and Records Regarding Wood's 1995 Postconviction Motion, Filed November 4, 2010

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

09-1348

PATRICK WOOD,

Petitioner/Appellant,

v.

KEVIN MILYARD, Warden, Sterling Correctional Facility; THE ATTORNEY GENERAL OF THE STATE OF COLORADO

Respondents/Appellees.

RESPONDENTS/APPELLEES' RESPONSE TO THIS COURT'S NOVEMBER 3, 2010 ORDER

Respondents/Appellees submit this Response to the Court's Order for a copy of all state court postconviction dockets and records regarding Mr. Wood's 1995 motion for postconviction relief.

1. The United States District Court ordered the complete state court record. Undersigned counsel spoke to the Adams County appellate clerk on November 4,

2010. She said that all pleadings, documents, minute orders, and other records related to Mr. Wood's case were sent to the United States District Court for Colorado on April 16, 2009, and that Adams County does not have any documents or other records relating to the 1995 motion.

2. In addition, counsel reviewed all the docket entries and portions of the state court record and was unable to find anything related to the disposition of the 1995 motion.

Respectfully submitted this 4th day of November 2010.

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/s/

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APPENDIX R — Order and Judgment of the United States Court of Appeals for the Tenth Circuit, Filed November 26, 2010

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 09-1348

(D.C. No. 1:08-CV-00247-WYD) (D. Colo.)

PATRICK WOOD,

Petitioner-Appellant,

v.

KEVIN MILYARD, Warden, Sterling Correctional Facility; THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents-Appellees.

ORDER AND JUDGMENT*

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*After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Before **HARTZ**, Circuit Judge, **PORFILIO** and **BRORBY**, Senior Circuit Judges.

State prisoner Patrick Wood appeals from a district court order that denied his pro se 28 U.S.C. § 2254 petition for habeas relief. This court granted Wood a certificate of appealability (COA) on two issues: (1) whether his convictions for felony murder and second-degree murder violated double jeopardy; and (2) whether his waiver of a jury trial was valid. This court alsc appointed counsel for Wood and directed the parties to address the timeliness of Wood's petition and other procedural barriers to considering the merits. For the reasons expressed below, we conclude that Wood's habeas petition was untimely, and therefore, we AFFIRM.

BACKGROUND

In January 1986, Wood robbed a pizza delivery store in Westminster, Colorado. While doing so, he shot the store's assistant manager in the head, killing him. Other store employees then subdued Wood until police arrived.

Wood was charged with first-degree murder after deliberation, first-degree felony murder, aggravated robbery, and two counts of felony menacing. A jury deadlocked on the murder counts, prompting the court to declare a mistrial. Thereafter, Wood agreed to a bench trial in exchange for the prosecution's agreement to not seek the death penalty.[1] Following the bench trial, the court found Wood guilty on the felony-murder, robbery, and menacing counts, but guilty of only second-degree murder on the deliberate-murder count. Dist. Ct. R. at 190-94. At sentencing, the court "merged" the robbery and murder counts, and imposed a life sentence plus two four-year terms for the menacing counts, all running concurrently. *Id.* at 196. The Colorado Court of Appeals affirmed Wood's convictions, and the Colorado Supreme Court denied certiorari in 1989.

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[1] Although the jury was deadlocked on the murder counts, the jury's foreman had signed the guilty verdicts on the robbery

In 1994, Wood sought federal habeas relief. But since he had not exhausted his state court remedies, the district court dismissed the petition.

Consequently, in June 1995, Wood filed a pro se motion in Colorado state court to vacate his conviction and sentence under Colo. R. of Crim. P. 35(c). He argued that double jeopardy barred his convictions for both felony murder and second-degree murder, that his trial counsel was ineffective in advising him to testify, and that his interrogation statements should have been suppressed. Wood also sought appointment of postconviction counsel. Four months later, when there had been no action on his filings, Wood filed a motion seeking a ruling. In December 1995, the state court responded by appointing the Colorado Public Defender's Office to represent Wood in the postconviction proceedings.

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and menacing counts. Dist. Ct. R. at 183-85. It appears, however, that the bench trial involved all of the original charges filed against Wood, not just the murder charges. *See id.* at 190-94, 196.

Eight years and four months passed with nothing occurring in the case. The state court docket indicates that in April 2004, Wood wrote a letter to the court. But as his appellate counsel indicates, "inexplicably no letter is in the state court file." Aplt. Supp. Opening Br. at 21 n.8.

On August 30, 2004, Wood filed a pro se petition, again seeking Rule 35(c) relief in state court. He again raised the double-jeopardy issue, but changed the focus of his ineffective-assistance claim to his waiver of a jury trial, and he added an equal-protection claim. On the petition's first page, Wood prominently stated that "[n]o other postconviction proceedings [had been] filed." Dist. Ct. R. at 217. The state postconviction court denied the petition. The Colorado Court of Appeals affirmed, and the Colorado Supreme Court denied certiorari on February 5, 2007.

One year later, on February 5, 2008, Wood filed a petition for habeas relief in federal district court. The form used by Wood requested information about "each postconviction proceeding" he had initiated. R. Vol. 1 at 8. Wood listed only his 2004 state postconviction application. Accordingly, the district court ordered Wood to show cause why his petition should not be denied as time barred, given that his 2004 postconviction application tolled the Antiterrorism and Effective Death Penalty Act's (AEDPA's) one-year limitations period from only 2004 to 2007. Wood filed a lengthy response, but he never mentioned his first attempt at obtaining state postconviction relief. The district court denied Wood's habeas petition as time barred.

Wood then moved for reconsideration, and again failed to mention the 1995 postconviction motion. The district court granted reconsideration, apparently to obtain the state's view of the timeliness issue. In its pre-answer response, the state informed the district court that Wood had filed a postconviction motion in 1995, and that it was never ruled upon. Instead of revisiting the timeliness issue, the district court ordered Wood to address exhaustion issues. Ultimately, Wood dismissed his unexhausted claims, and the district court denied Wood habeas relief on the merits of his remaining claims, which raised double-jeopardy and jury-waiver issues. Wood appealed, and this court issued a COA to consider those issues, as well as issues of timeliness and exhaustion.

DISCUSSION

I. Statute of Limitations[2]

AEDPA imposes a one-year limitations period for filing a federal habeas petition. 28 U.S.C. § 2244(d)(1). Where, as here, a petitioner's conviction became final before the date of AEDPA's enactment, April 24, 1996, the limitations period is viewed as running for a year from that date, i.e., until April 24, 1997. *Serrano v. Williams*, 383 F.3d 1181, 1183 (10th Cir. 2004). But "[t]his one-year period is tolled for the time 'during which a properly filed application for State post-conviction or other collateral

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[2] Although the district court's ultimate disposition of this case rested on grounds other than timeliness, "we have discretion to affirm on any ground adequately supported by the record." *Davis v. Roberts*, 425 F.3d 830, 834 (10th Cir. 2005) (quotation omitted); *see also Jones v. Hulick*, 449 F.3d 784, 787 (7th Cir. 2006) (considering timeliness of habeas petition for first time on appeal); *White v. Klitzkie*, 281 F.3d 920, 921-22 (9th Cir. 2002) (considering timeliness of habeas petition on appeal even though the issue was not decided by the district court or included in

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the COA). We pause for a moment, though, to note the Supreme Court's admonition that a federal court cannot "override a State's deliberate waiver of a limitations defense" and sua sponte dismiss a habeas petition. *Day v. McDonough*, 547 U.S. 198, 202 (2006). In their habeas answer, the Respondents provided a cryptic response to the timeliness question. They first incorporated an argument from their pre-answer response about the statute of limitations expiring before Wood filed his habeas petition, and then stated that they were "not challenging, but do not concede, the timeliness of [Wood's] [habeas] petition." R., Vol. 1 at 273. While the precise import of this quotation eludes us, we conclude it is not a deliberate waiver, given that it follows an argument as to why Wood's habeas petition would be untimely, and concludes with a refusal to concede that the petition is timely. *Cf. Day*, 547 U.S. at 209 (holding that state's erroneous concession of habeas petition's timeliness did not preclude the district court from sua sponte dismissing the petition as untimely).

Our consideration of the timeliness issue is particularly apt in this case, given that the issue was raised in the district court and addressed by Wood, the parties have briefed the issue on appeal, and the interests of justice would be served in reaching the timeliness issue given the extensive time period involved. *Cf. id.* at 210 (instructing courts considering the issue of timeliness sua sponte to "assure . . . that the petitioner is not significantly prejudiced by the delayed focus on the limitation issue, and determine whether the interests of justice would be better served by addressing the merits or by dismissing the petition as time barred" (quotation omitted)).

review with respect to the pertinent judgment or claim is pending.'" *Id.* (citing 28 U.S.C. § 2244(d)(2)). Thus, the issue we confront is whether Wood's 1995 motion remained pending, thereby tolling the limitations period, from April 24, 1996, until August 30, 2004, the day he filed his second postconviction application.

"[T]he pendency of a state post-conviction application . . . encompass[es] all of the time during which a state prisoner is attempting, through proper use of state court procedures, to exhaust state court remedies." *Id.* at 1184 (quotation omitted). "Although the interpretation of the term 'pending' is a matter of federal law, our definition does require some inquiry into relevant state procedural laws . . . ." *Gibson v. Klinger*, 232 F.3d 799, 806 (10th Cir. 2000). Under Colorado law, a motion for postconviction relief not resolved within a reasonable time may be deemed abandoned if the defendant "fails to take reasonable efforts to secure an expeditious ruling on the motion." *People v. Fuqua*, 764 P.2d 56, 58 (Colo. 1988); *see also People v. Abeyta*, 923 P.2d 318, 321-22 (Colo. App. 1996) (holding that defendant's unresolved postconviction claims from an earlier Rule 35(c) motion had been abandoned where "he was fully able to pursue them in a timely manner, [but] he failed to have them considered before the expiration of the limitation period" for seeking postconviction relief), *superceded by rule on other grounds as stated in People v. Roy*, 2010 WL 2305894, at *2 (Colo. App. June 10, 2010). This is consistent with "Congress's intent to encourage exhaustion of state court remedies without allowing prisoners to toll the limitations period indefinitely." *Gibson*, 232 F.3d at 807.

Indeed, "Congress and the courts appropriately built slack into the process by providing a *reasonable* grace period for pending applications, not for open-ended and unjustified delay in pursuing claims and relief. Tolling accommodates effort, not inaction." *Welch v. Carey*, 350 F.3d 1079, 1083 (9th Cir. 2003) (emphasis added).

The last action taken on Wood's 1995 postconviction motion was in December of that year, when the state court acted on Wood's motion for a ruling, and appointed postconviction counsel. But despite being able to seek action, Wood never again moved for a ruling. Indeed, he made no attempt to communicate with the court for any reason for over eight years. It was not until April 2004, when he sent the now-missing letter to the court, and then in August 2004, when he filed a new postconviction application, that he showed any interest in continuing to pursue relief from his convictions and sentence.[3]

Significantly, the fact that Wood represented in the 2004 application that "[n]o other postconviction proceedings [had been] filed," Dist. Ct. R. at 217, indicates that he had lost interest in, and had abandoned, the 1995 motion.[4] Similarly, he did not mention the 1995 motion when prompted by the form on which he sought federal habeas relief. Even when the district court threatened to dismiss his federal petition as untimely, Wood never claimed an interest in the 1995 motion. And when the district court dismissed the federal petition as untimely, Wood sought reconsideration without resort to the 1995 motion.

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[3] Even if the April 2004 letter was an attempt to inform the court of appointed counsel's inaction or to inquire about the status of his 1995 motion, we think it came too late. But more fundamentally, we question whether the letter in fact mentioned anything about the 1995 motion, given that Wood's August 2004 postconviction petition stated that no other postconviction applications had been filed.

[4] If we were to blindly accept Wood's assertion that his 2004 postconviction application were his first, the limitations period for

Under these unique circumstances, we conclude that Wood abandoned his 1995 motion before filing his 2004 petition. We need not decide, however, precisely when the abandonment occurred, as any break in the pendency of the 1995 motion after AEDPA's enactment renders Wood's 2008 federal habeas petition untimely. Specifically, a full year elapsed from the time the Colorado Supreme Court denied certiorari on February 5, 2007, until Wood filed his federal habeas petition on February 5, 2008. Consequently, there is no time left to account for *any* untolled period between AEDPA's April 24, 1996 enactment and Wood's 2004 postconviction application.

Wood's position appears to be that, without a ruling by the state postconviction court, his 1995 motion never stopped tolling the limitations period. But as the Respondents note, that would mean "the 1995 motion is *still* pending because it has never been ruled upon." Resp. Br. at 19. At some point, though, we must give meaning to Congress's intent in establishing a one-year limitations

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filing a federal habeas petition would have expired on April 24, 1997—over a decade before he filed his 2008 petition for habeas relief. *See Clark v. Oklahoma*, 468 F.3d 711, 714 (10th Cir. 2006) ("Only state petitions for post-conviction relief filed within the one year allowed by AEDPA will toll the statute of limitations.").

period. Thus, where, as here, a petitioner's inaction and subsequent statements on the limitations issue indicate that he stopped "attempting . . . to exhaust state court remedies," *Serrano*, 383 F.3d at 1184, and abandoned a state postconviction application, AEDPA's tolling provision will deactivate, and the limitations period will run.[5]

CONCLUSION

The judgment of the district court is AFFIRMED. Wood's second motion to supplement the record is GRANTED. The motion to proceed in forma pauperis is GRANTED.

Entered for the Court

Wade Brorby
Senior Circuit Judge

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[5] Although "the timeliness provision in the federal habeas corpus statute is subject to equitable tolling," *Holland v. Florida*, 130 S. Ct. 2549, 2554 (2010), Wood concedes that "[t]he availability of equitable tolling is not an issue." Aplt. Supp. Opening Br. at 23. In any event, equitable tolling requires "(1) that [Wood] has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Holland*, 130 S. Ct. at 2563 (quotation omitted). For the same reasons discussed above in regard to statutory tolling, we conclude that Wood did not diligently pursue his 1995 motion for state postconviction relief. Therefore, he does not qualify for equitable tolling.

PETITIONER'S
BRIEF

Supreme Court, U.S.
FILED
DEC 05 2011
OFFICE OF THE CLERK

No. 10-9995

IN THE

Supreme Court of the United States

REPRINTED COPY

PATRICK WOOD,

Petitioner,

v.

KEVIN MILYARD, WARDEN, STERLING CORRECTIONAL FACILITY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Does an appellate court have the authority to raise *sua sponte* a 28 U.S.C. § 2254(d) statute of limitations defense?

2. Does the State's declaration before the district court that it "will not challenge, but [is] not conceding, the timeliness of Wood's habeas petition," amount to a deliberate waiver of any statute of limitations defense the State may have had?

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OPINIONS BELOW

The Tenth Circuit's opinion in *Wood v. Milyard*, 403 Fed. Appx. 335 (10th Cir. 2010), is reproduced at App. 135a-144a. The district court's decision denying Wood's 28 U.S.C. § 2254 petition is reproduced at App. 96a-111a.

JURISDICTION

The Tenth Circuit Court of Appeals decided Wood's case on November 26, 2010. As allowed by the circuit court, Wood filed a petition for rehearing on January 3, 2011, which the court denied on January 7, 2011. As required by Supreme Court Rule 13, Wood's petition for writ of certiorari was filed within ninety days of the order denying rehearing. This Court granted the petition on September 27, 2011. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RULES AND STATUTORY PROVISION INVOLVED

The text of relevant rules is attached as Appendix A to this brief. These rules include Federal Rules of Civil Procedure, Rules 1, 8(c), 12(b), 15(a) and 81(a)(2), and the Rules Governing Section 2254 Cases in the United States District Courts ("Habeas Rules"), Rules 4, 5 and 12.

28 U.S.C. § 2244(d) provides:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of–

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this section.

STATEMENT OF THE CASE[1]

On February 5, 2008, Patrick Wood filed a petition for writ of habeas corpus, pursuant to 28 U.S.C. § 2254, in the United States District Court for the District of Colorado. App. 13a. Wood raised six constitutional claims, four of which were ultimately dismissed for non-exhaustion and two of which were denied by the district court on the merits. App. 74a-82a, 105a-110a. These latter claims involved constitutional claims that Wood's right to trial by jury had been violated and that his two convictions for murder of a single person violated double jeopardy.

The district court denied Wood a certificate of appealability, but the Tenth Circuit granted him one. App. 10a, 112a-130a. The circuit court appointed counsel for Wood and authorized the appeal of his two remaining claims, but the court also directed the parties to brief both the timeliness of Wood's § 2254 petition and any state procedural rules that might bar consideration of his claims. App. 113a, 129a.

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[1] The record in this case consists of one volume of federal district court pleadings and orders, and the state court record, which consists of one pleadings volume and a compact disc containing transcripts of pre-trial and trial proceedings. Citations to the record will be to the Joint Appendix ("App." with page number) whenever possible. When materials are not in the Joint Appendix, counsel will cite to the federal-court record by reference to "Record" and page number, and will cite to the state-court proceedings by volume and page number of the proceedings (*e.g.*, v1p8). Citations to matters contained in Appendices to this brief will be to the Brief Appendix and page number (*e.g.*, Br.App. 1a). Citations to pleadings filed in the Tenth Circuit Court of Appeals that are not included in the Joint Appendix will reference the date of the pleading and abbreviated title.

The timeliness of Wood's petition, however, had not been challenged by the state in the district court. App. 69a-72a, 87a. As explained below, although the state had identified a possible argument that Wood's petition was untimely, it also recognized that it was "unclear" whether the petition was, in fact, timely under the tolling provisions in § 2244(d)(2). App. 70a. Having identified a potential timeliness argument, the same one that would ultimately be adopted by the Tenth Circuit, the state nonetheless told the district court, "Respondents are not challenging, but do not concede, the timeliness of the petition." App. 87a.

The questions before this Court concern: (1) whether the state lost any right it had to assert the affirmative defense of timeliness once it informed the district court that it was not challenging the timeliness of Wood's petition and once the district court ruled on the merits of Wood's claims; and (2) whether the appellate court lacked authority to raise *sua sponte* the timeliness of Wood's petition under these circumstances.

1. State conviction, trial and sentence (District Court of Adams County, Colorado, Case No. 86CR123)

In 1986, Wood was charged in Colorado state court with two counts of first degree murder, (after deliberation and felony murder), one count of attempted aggravated robbery, two counts of menacing, and one count of aggravated robbery. v1p2-11,154.

The charges arose from an incident in January of 1986 in which Wood was accused of entering a pizza store, attempting to rob it, and killing the assistant store manager. v1p17-18. Two other employees disarmed Wood when he attempted to flee and restrained him until the police arrived. v1p17-18.

The prosecution initially sought the death penalty against Wood. v1p23-24. At the first trial, the jury deadlocked on count one (after deliberation first degree murder), but signed verdict forms on all other counts, and the court declared a mistrial. v1p183-185; 273, 281. The foreman's signature on the verdict form for felony murder is, however, scribbled out. v1p182. The Tenth Circuit's review of this record led it to observe in its decision, "[a]lthough the jury was deadlocked on the murder counts, the jury's foreman had signed the guilty verdicts on the robbery and menacing counts. [v1p183-185]. It appears, however, that the subsequent bench trial involved all of the original charges filed against Wood, not just the murder charges. [v1p190-94, 196]." App. 136a-137a, n.1.

After the mistrial, Wood signed a jury trial waiver, v1p187-188, the constitutional validity of which he has raised in this habeas proceeding, and his case was tried to the court. App.23a-24a. The trial court acquitted Wood of first degree murder (after deliberation) and convicted him of the lesser included offense of second degree murder, as well as all of the other charges, including felony murder. v1p190-194, 274. The court sentenced Wood to life in prison for murder (merging for purposes of sentencing the felony murder, second degree murder and aggravated robbery counts), and to concurrent 4-year terms for menacing. v1p196.

2. Direct appeal (Case No. 87CA0273)

Wood was represented on direct appeal by the same lawyer who represented him in the trial court. v1p34, 38, 281-82. On appeal, this lawyer challenged only the district court's denial of Wood's motion to suppress his statements. v1p197-202.

The Colorado Court of Appeals affirmed Wood's conviction in an unpublished decision issued May 4, 1989. v1p197-202; Record 207-215. The Colorado Supreme Court denied certiorari on December 10, 1989. v1p260; Record 220.

3. 1994 federal habeas proceeding (Case No. 94-K-219)

In 1994, prior to the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. 104-132, § 101 *et seq.*, 110 Stat. 1214, Wood filed a *pro se* habeas petition pursuant to 28 U.S.C. § 2254. This petition raised eight claims, five of which the magistrate judge determined, and Wood conceded, had never been raised in state court. The district court accordingly dismissed the mixed petition on March 21, 1995. v1p125.

4. State court postconviction proceedings in the trial court

a. 1995 Colorado Rule of Criminal Procedure 35(c) Motion to Vacate Judgment

On June 29, 1995, a few months after Wood's federal habeas petition was denied for failure to exhaust state court remedies, Wood filed a pro se Motion to Vacate

Judgment of Conviction and Sentence, pursuant to Colo. R. Crim. Proc. 35(c), in state court, along with a motion for appointment of counsel. v1p204-212. In his motion, Wood challenged only his class one felony conviction for first degree murder.[2]

On October 30, 1995, after approximately three months passed with no activity on his motions, Wood filed a Motion to Request a Ruling on Previously Filed Motions. v1p213-214. On December 1, 1995, the state district court appointed postconviction counsel for Wood. v1p215. To date, the record reflects Wood's 1995 state postconviction motion has not been ruled upon. App. 133a-134a.

b. 2004 State Petition for Postconviction Relief

On August 30, 2004, Wood filed in state court a pro se Petition for Postconviction Relief Pursuant to Colo. R. Crim. P. 35(c). v1p217-226.

Four days after the motion was filed, the state court denied it without a hearing. Record 167. The state court ruled that all claims, other than ineffective assistance of counsel, were procedurally barred by Wood's failure to raise the claims on direct appeal.[3] The court reached this conclusion even though it acknowledged that "[t]he Court does not have available the appellate record or the appellate decision issued by the Colorado Court of Appeals. The Court finds, however, that with each and every one of the grounds asserted could have been presented by the Defendant after his conviction." Record 168; v1p229. The court denied the ineffective assistance claim on the merits. *Id.*

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[2] Under Colorado law, there is no statutory time limit for filing a postconviction challenge to a class one felony conviction. *See* Colo. Rev. Stat. § 16-5-402(1). There is a three-year limitations period for challenging all other classes of felony convictions. *See id.*

[3] The state district court's procedural default ruling, although affirmed by the Colorado Court of Appeals and defended by the state in the federal courts, is patently wrong. The state courts relied on Colo. R. Crim. P. 35(c)(3)(VII), which creates a

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procedural bar to claims that could have been raised on direct appeal but were not. This Rule, however, was adopted in 2004. When Wood filed his direct appeal in 1987, state law permitted individuals to bring claims in postconviction proceedings even if the claims could have been raised on direct appeal. *See* Colo. R. Crim. P. 35(c)(2) (1984); *see also People v. Rodriguez*, 914 P.2d 230, 254 (Colo. 1996) (rejecting government's contention that claims available on direct appeal may not be brought in a postconviction proceeding absent special circumstances); *People v. Bradley*, 169 Colo. 262, 455 P.2d 199, 200 (1969) (one may raise constitutional issues in a postconviction motion "although the same issues could have been effectively raised on [appeal]").

As a matter of due process, Wood could not lawfully be barred from asserting claims under § 2254 by virtue of a state procedural rule that did not exist when the rule would have required him to act to preserve his claim. "[I]f a petitioner could not reasonably have been aware that a procedural rule would prevent the court from addressing the merits of his claim, his violation of that rule cannot bar federal review." *Osborn v. Shillinger*, 861 F.2d 612, 618 -621 (10th Cir. 1988); *see also Beard v. Kindler*, 130 S.Ct. 612, 619 (2009) (Kennedy, J. concurring)("We have not allowed state courts to bar review of federal claims without adequate notice to litigants who, in asserting their federal rights, have in good faith complied with existing state procedural law."); *Ford v. Georgia*, 498 U.S. 411, 423 (1991) ("the sufficiency of such a rule to limit all review of a constitutional claim itself depends upon the timely exercise of the local power to set procedure").

It appears the state court did not review the court file before ruling, since both the Colorado Court of Appeals decision, which the trial court indicated it did not have available, and a written jury waiver can easily be found in the court's file. v1p187-188, 197-203. Moreover, the file reflects that Wood's 1995 postconviction motion was still pending and that counsel had been appointed to represent Wood on that motion.

c. 2004 Motion to Re-Examine Defendant's Petition for Postconviction Relief

On October 7, 2004, Wood filed a motion asking the state court to re-examine his petition for postconviction relief. Record 170-171. Wood asked that, if the court were correct and the failure to raise issues on appeal created a procedural default, he be allowed to add a claim of appellate ineffective assistance against his appellate lawyer, who had also represented him at trial. *Id.*

The district court denied Wood's motion without considering the merits of Wood's request, ruling that "unfortunately no statutory right" to seek reconsideration existed.[4] v1p234-5.

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[4] This ruling is demonstrably wrong. *See, e.g., People v. Albaugh,* 949 P.2d 115, 116 (Colo.App. 1995); *Stone v. People,* 895 P.2d 1154 (Colo. App. 1995); *People v. Janke,* 852 P.2d 1271 (Colo. App. 1992). Although there is no "statutory right" to seek reconsideration of final orders in criminal cases, Colorado courts recognize that reconsideration motions may be filed and ruled on so long as they are ruled on while the district court still has jurisdiction, *i.e.* before the 45-day deadline for a notice of appeal expires. *See, e.g., People v. Albaugh,* 949 P.2d 115, 117 (Colo. App.1997); *see also* Colo. App. R. 4.

5. State postconviction appeal (Case No. 04CA2252)

The state court denied Wood's request for appointment of counsel on appeal, and he was pro se in the state appellate courts. v1p256-259.

On August 3, 2006, the court of appeals affirmed the district court's order denying postconviction relief. Record 207; v1p262-269. Like the district court, the state court of appeals rejected all but one of Wood's challenges, because of the purported procedural default based on Wood's failure to raise issues on direct appeal, a "procedural default" rule that did not exist at the time of defendant's direct appeal. Record 211-212; v1p266-67. *See* n. 3, *supra* at p.9. The court rejected Wood's ineffective assistance of counsel claim on the merits. v1p267-268.

The Colorado Supreme Court denied Wood's petition for writ of certiorari on February 5, 2007. v1p260.

6. Federal habeas proceedings in the district court (Case No. 08-cv-00247)

Wood filed his 28 U.S.C. § 2254 habeas petition on February 5, 2008, within a year of the state supreme court's order denying certiorari, and raised six claims. App. 13a.

a. District Court's Initial Decision to Dismiss Petition as Untimely

Pursuant to Habeas Rule 4, the district court, which was not aware of Wood's pending 1995 state postconviction motion, initially dismissed Wood's § 2254 petition as untimely without seeking a response from the state. App. 41a-46a. Wood filed a motion asking the court to reconsider, App. 47a, and the court vacated the dismissal and directed the state to file a pre-answer response limited to the issues of timeliness and procedural default. App. 61a, 64a.

b. State's Decision Not to Challenge the Timeliness of Wood's Petition

The district court's order requiring the state to file a pre-answer response directed the state to notify the court if it intended to raise a limitations defense. Specifically, the court ordered that:

> Respondents are directed pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts to file a Pre-Answer Response limited to addressing the affirmative defenses of timeliness under 28 U.S.C. § 2244(d) and/or exhaustion of state court remedies under 28 U.S.C. § 2254(b)(1)(A). If Respondents do not intend to raise either of these affirmative defenses, they must notify the Court of that decision in the Pre-Answer Response.

App. 64a-65a.

In its pre-answer response, the state challenged some of Wood's claims as unexhausted, but chose not to challenge the timeliness of his petition. App. 67a-70a. Although the state recognized the existence of a possible argument that

Wood's petition was untimely, it also recognized that the impact of Wood's filing of the state postconviction motion in 1995 was "unclear," i.e., it was unclear whether the 1995 motion may have tolled the limitations period under § 2244(d)(2), until the 2004 motion was filed. Such tolling would render Wood's habeas petition timely filed. App. 70a.

Specifically, the state represented to the district court in its pre-answer response:

> As previously noted, Wood filed postconviction motions in the state district court in 1995 and 2004. It is clear that if Wood had filed only the 2004 motion his habeas petition would be untimely because the motion was filed long after his time for filing a habeas petition had passed. But it is unclear how the 1995 postconviction motion, which apparently was never ruled upon, affects the timeliness of Wood's habeas petition. While it is certainly arguable that the 1995 postconviction motion was abandoned before 1997 and thus did not toll the AEDPA statute of limitations at all, [citation omitted], Respondents will not challenge, but are not conceding, the timeliness of Wood's habeas petition in this pre-answer response.

App. 70a.

Once the state filed its pre-answer response in which it informed the court that it "will not challenge, but [is] not conceding, the timeliness" of Wood's petition, the district court did not concern itself further with the timeliness of the petition. Instead, the court dismissed four claims the state had argued were unexhausted and ordered the state to file an answer in response to the remaining claims. App. 81a, 83a.

The district court's order expressly required the state's answer to "conform[ ] to the requirements of Rule 5 of the Rules Governing Section 2254 Cases." App. 83a. The cited rule requires the respondent to address the allegations in the petition and to "state whether any claim in the petition is barred by failure to exhaust state remedies, a procedural bar, non-retroactivity, or a statute of limitations." Br.App. 1a.

In compliance with the court's order and Habeas Rule 5(b), the state asserted a procedural default defense to Wood's double jeopardy claim, and, once again, apprised the district court that it was not challenging, but was not conceding, the timeliness of the petition. App. 87a-89a. As it relates to the timeliness of Wood's petition, the state wrote in its answer:

> Under 28 U.S.C. § 2244(d), a one-year limitations period applies to applications for writ of habeas corpus. As noted in the pre-answer response, the Respondents are not challenging, but do not concede, the timeliness of the petition. The Respondents hereby incorporate the arguments raised in the pre-answer response into this answer.

App. 87a.

c. District Court's Decision on the Merits

The district court denied Wood's remaining two claims on their merits. App. 105a-111a. The court did not address the timeliness of Wood's petition, it not having been challenged by the state. App. 96a-111a.

7. Certificate of Appealability

The district court denied Wood a certificate of appealability. App. 10a. Nevertheless, as allowed by the Tenth Circuit, Wood filed a pro se opening brief and application for certificate of appealability in which he argued the merits of the double jeopardy and jury trial waiver claims the district court had decided against him on the merits and that his other claims had been erroneously dismissed as unexhausted. 10.19.9 Application; 10.19.9 Brief.

The state filed a responsive brief opposing the certificate of appealability. The state argued that Wood's dismissed claims were unexhausted and properly dismissed and his remaining claims were without merit. 12.8.9 Response. True to its word in the district court, the state did not challenge the timeliness of Wood's petition. *See id.*

After reviewing the record and pleadings, the Tenth Circuit Court of Appeals granted a certificate of appealability on the two substantive issues the district court had denied on the merits.[5] In addition, the court directed the parties to brief both the issue of timeliness and the issue of procedural default. App. 123a, 126a, 129a. Noting that Wood's petition "presents several complex procedural and substantive issues," and finding that "disposition of this case, and the interests of justice, would be aided by the appointment of counsel," the circuit, pursuant to 18 U.S.C. § 3006A(a)(2), appointed counsel to represent Wood on appeal. App. 113a, 129a.

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[5] The circuit court granted a certificate of appealability on "(1) Wood's claim that his simultaneous convictions for felony murder and second degree murder violate his right against double

8. The Tenth Circuit's Decision

In compliance with the certificate of appealability, the parties briefed the merits, as well as the issues of timeliness and procedural default. Notwithstanding the state's express decision not to challenge timeliness in the district court, the Tenth Circuit affirmed the district court's order dismissing Wood's petition with prejudice, solely on the ground the petition was untimely under 28 U.S.C. § 2244(d). App. 135a-144a. The Tenth Circuit did not address the merits of Wood's claims or the respondents' assertion of procedural default.

The Tenth Circuit ruled that Wood abandoned his 1995 state postconviction motion sometime before he filed his 2004 state postconviction motion. The court ruled therefore that the tolling authorized by § 2244(d)(2) had stopped before Wood's § 2254 habeas petition was filed in 2008, resulting in the expiration of the one-year statutory limitations period. App. 143a.

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jeopardy under the Fifth and Fourteenth Amendments to the Constitution, and (2) Wood's claim that his decision to waive a jury trial was not 'knowing, intelligent, and voluntary.'" App. 113a.

The Tenth Circuit, citing to *Day v. McDonough*, 547 U.S. 198 (2006), acknowledged that it could not "override a State's deliberate waiver of a limitations defense" and *sua sponte* dismiss a petition. App. 139a, n.2, quoting *Day*, 547 U.S. at 202. However, the court did not believe that the state's declaration in the district court that "it will not challenge, but [is] not conceding the timeliness of Wood's habeas petition" constituted a waiver or forfeiture of the affirmative defense. App. 139a, n.2. Instead, the court wrote that it did not understand what the state meant when it said it was not challenging, but was not conceding the timeliness of the petition, but whatever the state meant, it did not amount to a deliberate waiver of the defense:

> In their habeas answer, the Respondents provided a cryptic response to the timeliness question. They first incorporated an argument from their pre-answer response about the statute of limitations expiring before Wood filed his habeas petition, and then stated that they were "not challenging, but do not concede, the timeliness of [Wood's][habeas] petition." R., Vol. 1 at 273. While the precise import of this quotation eludes us, we conclude it is not a deliberate waiver, given that it follows an argument as to why Wood's habeas petition would be untimely, and concludes with a refusal to concede that the petition is timely. *Cf. Day*, 547 U.S. at 209 (holding that state's erroneous concession of habeas petition's timeliness did not preclude the district court from *sua sponte* dismissing the petition as untimely).

App. 139a, n.2.

Wood filed a timely petition for rehearing in which he challenged the circuit court's authority to raise the timeliness defense *sua sponte* when the state had specifically chosen to forgo the defense in the district court. 1.5.11 Petition for Rehearing at 3-9. In the alternative, Wood challenged the court's finding that his 1995 state court postconviction motion had been abandoned and was no longer pending, both as a matter of state law and as a matter of fact. *Id.* at 10. The panel denied the petition, and Wood filed his petition for writ of certiorari in this Court on April 7, 2011.

SUMMARY OF THE ARGUMENT

As a general rule, affirmative defenses based on statutes of limitations must be pled, and such defenses are forfeited or waived if not asserted in the district court.[6] Thus, litigants cannot raise a limitations defense for the first time on appeal; nor can appellate courts raise such a defense *sua sponte* for the first time on appeal.

The one-year federal limitations period in 28 U.S.C. § 2244(d) for filing habeas petitions is an affirmative defense, subject to waiver or forfeiture. Accordingly, when, as in Wood's case, the state has the opportunity in the district court to assert a statute of limitations defense and chooses not to do so, the state waives the affirmative defense, and an appellate court lacks the authority *sua sponte* to revive that affirmative defense on the state's behalf.

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[6] Although jurists and litigants often use the words waiver and forfeiture interchangeably, "forfeiture is the failure to make the timely assertion of a right," and "waiver is the 'intentional relinquishment or abandonment of a known right.'" *United States v. Olano*, 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)); *see also Kontrick v. Ryan*, 540 U.S. 443, 458, n.13 (2004).

That the authority of the circuit courts is circumscribed in this way is consistent with: precedent; the historical treatment of statute of limitations defenses; the applicable civil and habeas rules; judicial economy; and the adversarial process, which contemplates both the principle of party presentation and the principle that judges will not act as advocates on behalf of one side or the other.

This Court in *Day v. McDonough*, 547 U.S. 198 (2006), carved out a limited exception to the well-settled principle that a litigant who fails to plead an affirmative defense waives any right to assert it. Pursuant to *Day*, a district court may, in certain circumstances, *sua sponte* raise a §2244(d) limitations defense, *e.g.*, where the respondent's failure to argue the defense was the result of a clear and inadvertent computation error.

The *Day* exception should not be extended to appellate courts, as it is justified in significant part by the authority given district courts to freely allow amendments to pleadings while a matter is still pending. Since Habeas Rule 4 permits a district court to dismiss a petition on timeliness grounds without even seeking the respondent's position, and Fed. Rule. Civ. Proc. 15(a) permits district courts to freely grant respondents leave to amend their pleadings, this Court in *Day* perceived little difference between (1) permitting a magistrate judge to act *sua sponte* and raise timeliness, and (2) requiring the magistrate judge to inform the state of its obvious computation error and allow it to amend its answer to raise a § 2244(d) defense.

Appellate courts, as opposed to district courts, lack the same flexibility or authority to permit litigants to change their claims or advance new ones for the first time on appeal. In contrast to the relative freedom and flexibility in the district courts to add or amend claims, by the time a case gets to the appellate courts, the parties are generally limited to the issues that have been preserved in the district court. Accordingly, an affirmative defense that has not been raised in the district court is a non-issue for purposes of appeal. And, as this Court as held in other cases involving non-jurisdictional, claim-processing time bars, a litigant cannot raise a time bar for the first time after the district court has already ruled on the merits. *See, e.g.*, *Eberhart v. United States*, 546 U.S. 12, 19 (2005).

The Tenth Circuit is alone among the circuits in holding that an appellate court can raise a § 2244(d) defense *sua sponte*, the other two circuits to have addressed the issue having ruled to the contrary. *See Sasser v. Norris*, 553 F.3d 1121 (8th Cir. 2009); *Grigsby v. Cotton*, 456 F.3d 727 (7th Cir. 2006). Those circuits are correct. Applying traditional principles of forfeiture, the state cannot on appeal raise a § 2244(d) defense that it elected not to assert in the district court. Nor can the appellate court raise on behalf of the state the very defense the state forfeited in the district court.

Even if a circuit court could, as a general matter, properly raise the §2244(d) limitations defense on appeal, the Tenth Circuit's application of the statute of limitations to Wood's petition violates the clear dictate in *Day* that a court is not free to disregard a state's deliberate choice not to raise a statute of limitations defense in the district court. Here, the district court ordered the state to brief the issue of timeliness, and in response the state identified a potential timeliness argument available to it, but consciously chose not to assert it, informing the district court that it "will not challenge, but is not conceding the timeliness of Wood's petition." This statement reflects a considered choice to not plead or assert the affirmative defense of timeliness and, thus, constitutes both a deliberate waiver and a forfeiture of the defense. The Tenth Circuit abused its discretion and strayed outside the bounds of the adversarial process in disregarding the state's waiver and raising the limitations defense on its own.

ARGUMENT

I. Appellate Courts Lack Authority to Raise *Sua Sponte* a 28 U.S.C. § 2244(d) Limitations Defense When, as in Wood's Case, the State Has an Opportunity to Raise the Affirmative Defense in the District Court, Does Not Assert the Defense, and the District Court Rules on the Merits.

As a general rule, affirmative defenses are waived or forfeited unless asserted by a litigant. The statute of limitations in § 2244(d) is an affirmative defense and, as such, it is subject to waiver. *See Day v. McDonough*, 547 U.S. 198, 205 (2006). If a litigant fails to assert a non-jurisdictional time bar in the district court, and the court rules on the merits, the litigant cannot assert the limitations defense for the first time on appeal. *See, e.g., Eberhart v. United States*, 546 U.S. 12, 19 (2005).

a. The Section 2244(d) limitations defense is an affirmative defense that is generally forfeited if not raised by the state.

Historically, the passage of time did not bar an application for habeas corpus. *See* Wright & Miller, 17B Fed. Pract. & Proc. Juris. § 4268.2 (3d ed.). A change to this doctrine occurred in 1977 when former Habeas Rule 9(a) became effective. *See id.* This rule provided for dismissal of a petition on grounds of prejudicial delay. *See generally* 2 Hertz & Liebman, Federal Habeas Corpus Practice and Procedure § 24.2 at 1273-1286 (6th ed. 2011).

Between 1977 and the adoption of AEDPA, habeas petitions could be dismissed for prejudicial delay, but only if specific criteria were met: first, the respondent had to plead and prove that the petitioner delayed initiating state exhaustion proceedings; and, second, the respondent had to plead and prove, and the court had to find explicitly, that the petitioner's delay prejudiced the state in some particular way that prevented the state from defending against the petitioner's habeas claims. *See id.* at 1273-1274.

In 1996, with AEDPA, Congress adopted a straightforward one-year statute of limitations, which is triggered by one of several dates, most often the date the petitioner's state court conviction became final. *See* § 2244(d)(1).[7] The limitations period is statutorily tolled by the pendency of a properly filed application for state court postconviction or other collateral review. *See* § 2244(d)(2).

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[7] The text of 28 U.S.C. § 2244(d) is set forth *supra* at 2.

When Congress chose to adopt this one-year statute of limitations for the filing of § 2254 habeas petitions, it did so against a backdrop of the courts' traditional approach to statute of limitations defenses, by which such defenses were forfeited if not raised by a litigant:

> It is a frequently stated proposition of virtually universal acceptance by the federal courts that a failure to plead an affirmative defense as required by Federal Rule [of Civil Procedure] 8(c) results in the waiver of that defense and its exclusion from the case.

Wright & Miller, 5 Fed. Prac. & Proc. Civ. § 1278, "Effect of Failure to Plead an Affirmative Defense" (3d ed.).

A rule of forfeiture when the state does not raise the statute of limitations in the district court is consistent with the historical understanding of such defenses. If Congress had intended to avoid traditional principles of forfeiture or waiver vis-a-vis the statute of limitations defense in § 2244(d) it could have, but it did not. For example, when Congress enacted AEDPA it provided in 18 U.S.C. § 2254(b)(3) that "[a] State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement." No similar statute limits the application of traditional principles of forfeiture and waiver to the statute of limitations defense in § 2244(d).

b. Governing case law holds that the right to assert a non-jurisdictional limitations defense is lost if not raised by a party before the merits of a case are determined by the district court.

In this case, the state told the district court that it was not challenging the timeliness of Wood's petition, and the district court then ruled on the merits. Under these circumstances, the Tenth Circuit's decision to raise *sua sponte* the state's affirmative defense of timeliness and deny Wood habeas relief on that ground conflicts with this Court's precedent. *See Kontrick v. Ryan,* 540 U.S. 443 (2004) (debtor's non-jurisdictional timeliness defense is forfeited if not raised before bankruptcy court rules on merits of claim); *Eberhart v. United States,* 546 U.S. 12 (2005) (government's timeliness defense to Fed. R. Crim. Proc. Rule 33 motion for new trial is forfeited if not raised until after trial court has ruled on motion).

In *Kontrick,* this Court held that any defense based on the time limitations in Federal Rules of Bankruptcy Procedure 4004 and 9006 was forfeited when the debtor took too long to challenge the timeliness of a creditor's complaint. This Court distinguished between rules governing subject matter jurisdiction and "inflexible claim-processing rule[s]." 540 U.S. at 455-456. A court's subject-matter jurisdiction can be raised at any time and cannot be expanded by the parties' litigation conduct, "a claim-processing rule, on the other hand, even if unalterable on a party's application, can nonetheless be forfeited if the party asserting the rule waits too long to raise the point." *Id.* at 456.

It was uncontested in *Kontrick* that the creditor had waited too long to file his amended complaint objecting to the debtor's discharge. The sole issue was whether the debtor had, nonetheless, forfeited his right to challenge the timeliness of the creditor's objection by not raising the defense until after the amended complaint was adjudicated on the merits. This Court recognized that "[o]rdinarily, under the Bankruptcy Rules as under the Civil Rules, a defense is lost if not included in the answer or amended answer." *Id.* at 459. Since the debtor's objection was not to the court's jurisdiction, but merely to the timeliness of the creditor's complaint, this Court held the debtor's objection could not be heard after the bankruptcy court had ruled against him on the merits. *See id.* at 459-60.

Kontrick's distinction between claim-processing rules and jurisdiction was applied again by this Court in *Eberhart v. United States,* 546 U.S. 12 (2005) (per curium). In *Eberhart,* the defendant failed to comply with the rigid seven-day deadline in Federal Rule of Criminal Procedure 33 for filing motions for new trial. The prosecution responded to the merits of the motion for new trial and did not challenge its timeliness under Rule 33. The government lost the motion for new trial and appealed. On appeal, the government challenged the district court's ruling on the merits, but also raised the timeliness of the defendant's motion for the first time. The circuit court reversed, finding that the limitations period was jurisdictional, and this Court granted certiorari. 546 U.S. at 13-15.

In pertinent part, this Court held that Rule 33 of the Federal Rules of Criminal Procedure, like the Bankruptcy Rules examined in *Kontrick,* was not a jurisdictional limitations period, but rather was a claim-processing rule and was, thus, subject to forfeiture. *See Eberhart* at 18-19. This Court again found that such claim-processing rules can "assure relief to a party properly raising them, but do not compel the same result if the party forfeits them." *Id.* at 19. Because the government "failed to raise the defense of untimeliness until after the District Court had reached the merits, it forfeited that defense. The Court of Appeals should therefore have proceeded to the merits." *Id.*

Similarly, the one-year statute of limitations in § 2244(d) is not jurisdictional, and it can be forfeited or waived. *See, e.g., Holland v. Florida,* 130 S. Ct. 2549, 2560 (2010), citing *Day v. McDonough,* 547 U.S. at 205. Accordingly, when, as in Wood's case, the § 2244(d) timeliness defense is raised for the first time on appeal, it is error for a court of appeals to decide the case on the basis of timeliness when a timeliness defense was not raised in the district court, and the district court instead ruled on the merits.

The § 2244(d) time bar, just like the rigid claim-processing rules examined in *Kontrick* and *Eberhart,* is not jurisdictional and should be deemed forfeited when, as here, the respondent has not asserted it until after the district court has ruled on the merits of a petitioner's claims.

c. The Federal Rules of Civil Procedure and the Habeas Rules also require that affirmative defenses be asserted by a litigant in a timely manner.[8]

The Federal Rules of Civil Procedure apply to § 2254 habeas corpus proceedings to the extent these rules are not inconsistent with applicable federal statutes and rules. *See, e.g., Gonzalez v. Crosby*, 545 U.S. 524, 528 (2005) (citing Habeas Rule 11; Fed. R. Civ. Proc. 81(a)(2)).

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[8] The Appendix to this brief contains the text of the rules cited in this section.

The rules of civil procedure require a litigant to plead or raise a non-jurisdictional statute of limitations defense. *See* Fed. R. Civ. Proc. 8(c); 12(b). If a litigant fails to assert an affirmative defense in the district court, it is waived or forfeited for purposes of appeal. *See* Wright & Miller, 5 Fed. Prac. & Proc. Civ. § 1278 (3d ed.).

The civil rules are not inconsistent with the habeas rules in this regard. Habeas Rule 5, which governs the respondent's answer in § 2254 proceedings, requires a respondent to file an answer only when the judge so orders. Br.App. 1a. But when, as in Wood's case, the court orders the respondent to file an answer, it "must state whether any claim in the petition is barred by failure to exhaust state remedies, a procedural bar, non-retroactivity, or a statute of limitations." Habeas Rule 5(b). Thus, the habeas rules, like the civil rules, contemplate the assertion of an affirmative defense in a responsive pleading.

d. The traditional prohibition against appellate courts considering statute of limitations defenses for the first time on appeal applies to the § 2244(d) limitations defense in § 2254 habeas proceedings.

As explained above, the relevant federal civil and habeas rules, and this Court's precedent, dictate that rights under non-jurisdictional claim-processing rules are forfeited if not timely raised before the district court rules on the merits of the claim. This doctrine has many virtues, and they apply with equal force to habeas proceedings on appeal.

A clear requirement that the state raise any § 2244(d) limitations defense in the district court has the virtue of simplicity and ease of enforcement. It advances judicial economy by requiring that dispositive limitations defenses be raised and resolved before judicial resources are needlessly expended in deciding the merits of a case or other difficult issues of exhaustion or procedural default. Such requirement discourages sandbagging, preventing a party from initially withholding a limitations defense for strategic advantage, in the hope of prevailing on other claims or defenses. It advances the adversary and party presentation principles underlying the American judicial system, by requiring issues to be presented by the parties to the court. And, finally, it advances the judicial neutrality and appearance of impartiality that is essential to our system of justice.

Section 2244(d) is a federal timing or claim-processing rule, which does not raise the same comity and federalism concerns as exhaustion or procedural default. *See Holland v. Florida*, 130 S.Ct. 2549, 2563 (2010). There is no reason why a respondent should not be deemed to have waived or forfeited any § 2244(d) statute of limitations defense when it has had the opportunity to assert the defense in the district court, and it chooses not to. The statute of limitations in § 2244(d) is a traditional statute of limitations and, as such, is subject to forfeiture when not raised. *See Kontrick v. Ryan*, 540 U.S. 443, 448 (2004).

Forfeiture or waiver of the § 2244(d) limitations defense on appeal is not inconsistent with traditional habeas practice, since there was no time bar for habeas proceedings until the enactment of AEDPA in 1996. *See* Wright & Miller, 17B Fed. Pract. & Proc. Juris. § 4268.2 (3d ed.). In contrast to other habeas defenses, which were created by the courts in an exercise of their traditional equitable authority, the § 2244(d) time bar is a statutory affirmative defense that cannot be raised for the first time on appeal if not raised in the district court. *Compare Granberry v. Greer*, 481 U.S. 129 (1987) (exhaustion may, in certain circumstances, be raised for the first time on appeal) and *Kontrick*, 540 U.S. at 458 (untimeliness argument forfeited where not raised until after adjudication on merits).

e. The Tenth Circuit's decision to consider *sua sponte* the timeliness of Wood's petition for the first time on appeal conflicts with the decisions of other circuits, which have refused to consider a § 2244(d) limitations defense for the first time on appeal.

The Tenth Circuit invoked the general proposition that appellate courts may affirm on any ground supported by the record to support its decision to raise *sua sponte* the § 2254(d) statute of limitations. This general proposition, however, does not empower an appellate court to rely on an affirmative defense to uphold a lower court's merits decision, since, as explained above, affirmative defenses are waived or forfeited if not raised in the district court.

The Tenth Circuit's assertion of authority to address *sua sponte* the § 2244(d) timeliness defense when raised for the first time on appeal conflicts with the only other circuits to have considered the issue. *Compare Sasser v.*

Norris, 553 F.3d 1121, 1128 (8th Cir. 2009) ("The discretion to consider the statute of limitations defense *sua sponte* does not extend to the appellate level.").

Not only have other circuit courts refrained from raising § 2244(d) limitations defenses *sua sponte*, they have not allowed respondents themselves to raise such defenses for the first time on appeal when they had the opportunity to raise the defense in the district court and failed to do so.

In the wake of *Day v. McDonough*, two circuits, in addition to the Tenth Circuit, have considered whether § 2244(d) timeliness challenges to habeas petitions can be made for the first time on appeal. *See Barnett v. Roper*, 541 F.3d 804, 807 (8th Cir. 2008); *Grigsby v. Cotton*, 456 F.3d 727, 731 (7th Cir. 2006). The timeliness challenges in these cases, unlike in Wood's, were made by the respondents for the first time on appeal, not by the circuit court acting *sua sponte*.

The Eighth Circuit has drawn a clear line between a district court raising a § 2244(d) defense *sua sponte*, which is permitted under certain circumstances in *Day*, and an appellate court considering the defense when raised for the first time on appeal. The Eighth Circuit holds that when the state fails to raise a timeliness objection to a § 2254 petition in the district court, it forfeits any such objection and cannot raise it for the first time on appeal. *See Barnett*, 541 F.3d at 807.

The Eighth Circuit acknowledged that this Court, in *Day*, carved out an exception to the general rule that limitations defenses are forfeited unless pled. *See id.*

However, the Eighth Circuit declined to extend the *Day* exception, which permits a district court to raise the timeliness of a state prisoner's habeas petition *sua sponte*, to appellate courts. *See id.; accord Sasser v. Norris*, 553 F.3d at 1128.

In part, the *Barnett* Court refused to extend *Day* to the appellate level because of this Court's decision in *Kontrick* that a timeliness objection cannot be raised after the case has been decided on the merits. *Barnett, supra*, citing, *Kontrick v. Ryan*, 540 U.S. 443 (2004). In *Barnett*, the petitioner conceded that his application was 25 days late. *See id.*, 541 F.3d at 807. Nevertheless, the appellate court determined that the state had forfeited any timeliness defense by not raising it in the district court and held the state could not raise it for the first time on appeal. *See id.* at 807-808; *accord Sasser*, 553 F.3d at 1128 ("Because the government did not timely assert the statute of limitations defense, the statute of limitations defense is forfeited").

The Seventh Circuit also refused to consider the timeliness of a state prisoner's habeas petition when the timeliness defense was not raised in the district court. *See Grigsby v. Cotton*, 456 F.3d at 731. The *Grigsby* Court wrote:

> We will not enforce the alleged untimeliness of Grigsby's petition. ... [I]t was the state's duty to raise [the limitations defense] in the district court, and it has provided us no reason to excuse its failure to do so. [citation omitted]. The timeliness of the petition, regardless of the claims it raised, was clear at the time the state filed its response. The period of limitations set

> out in 28 U.S.C. § 2244(b)(3) is not jurisdictional, and thus we are not bound to enforce it against a petitioner. *See Day*, 126 S.Ct. at 1681. In this case, it would be inappropriate for us to reach a timeliness argument that the state did not raise in its response in the district court, and which did not form the basis for the district court's ruling. *Compare Day*, 126 S.Ct. at 1684 (district court may raise timeliness *sua sponte* despite state's erroneous concession that habeas petition was timely), with *Eberhart v. United States*, [546 U.S. 12, 19] (2005) (per curiam) (government forfeited timeliness of defendant's Federal Rule of Criminal Procedure 33(b) motion by raising it after district court ruled on motion's merits).

Id., 456 F.3d at 731; *compare Jones v. Hulick*, 449 F.3d 784, 787-88 (7th Cir. 2006).[9]

Thus, the *Grigsby* Court held that it would be "inappropriate" for it to reach the timeliness argument when it was not raised by the state in its response and did not provide a basis for the district court's decision.

---

[9] In *Jones v. Hulick*, 449 F.3d 784 (7th Cir. 2006), a case the Tenth Circuit relied on in this case, App. 139a., the habeas petition was dismissed in the district court before the state filed a response. Thus, the respondent's first opportunity to raise the defense was on appeal. Under these circumstances, the appellate court agreed to decide the timeliness issue, emphasizing that "the State raised the defense at its first realistic opportunity." *Id.*, 449 F.3d at 787. In this case, by contrast, the state had every opportunity to raise a § 2244(d) defense in the district court and chose not to do so.

f. The limited exception this Court recognized in *Day v. McDonough* to the requirement that affirmative defenses be pled, which exception permits a district court to raise a limitations defense *sua sponte*, does not apply in the appellate courts.

In *Day*, the state failed to plead the § 2244(d) statute of limitations defense as a result of clear and inadvertent "computation error." 547 U.S. at 210. Under such circumstances, this Court recognized that a district court may overlook a respondent's failure to plead and assert the limitations defense and raise the defense on its own. 547 U.S. at 210. *Day* did not address whether an appellate court may do the same.

The exception recognized in *Day* to the traditional requirement that litigants must plead, or else forfeit, a statute of limitations defense rests in significant part on the authority given district courts to freely allow amendments to pleadings while a matter is still pending. *See id.* at 209 (citing Fed. R. Civ. Proc. 15(a) and 28 U.S.C. § 2243). Because the district court in *Day* had the discretion to inform the state of its obvious calculation error and invite the state to amend its answer to correct the mistake, this Court saw no reason to forbid the district court from accomplishing the same result through *sua sponte* consideration of the defense. *See id.* ("Recognizing that an amendment to the State's answer might have obviated this controversy, we see no dispositive difference between that route, and the one taken here.").

Appellate courts, on the other hand, do not generally permit litigants to raise new claims for the first time on appeal. To the contrary, as a general rule, claims not raised in the district court cannot be raised on appeal. *See generally United States v. Olano*, 507 U.S. 725, 731(1993) (" 'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited ... by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it' " (quoting *Yakus v. United States*, 321 U.S. 414, 444 (1944)). *Day*'s reliance on Fed. R. Civ. Proc. 15(a) and § 2243, which allow the state to amend its answer to add a defense in the district court, does not similarly support allowing consideration of a § 2244(d) limitations defense for the first time on appeal.

The Tenth Circuit's decision to *sua sponte* raise the timeliness defense on behalf of the state, especially after the state's express decision "not to challenge" timeliness, crosses a line. That line separates judging from acting as an advocate for a party. As noted in *Day*, if district courts have no obligation to act as counsel for a pro se litigant, "then, by the same token, they surely have no obligation to assist attorneys representing the State." 547 U.S. at 210. The dissent in *Day* agreed with the majority on this general point and believed that a district court's duty not to intrude on the adversarial process prohibited it from *sua sponte* consideration of the limitations defense even when the state's failure to raise it was based on an obvious calculation error. *Day*, 547 U.S. at 217 n.2 (Scalia, J. dissenting) ("Requiring the State to take the affirmative step of amending its own pleading at least observes the formalities of our adversary system, which is a nontrivial value in itself.")

Requiring the state to plead a § 2244(d) limitations defense in the district court before the defense can be raised on appeal serves to advance the adversary and party presentation principles underlying the American judicial system. As this Court recognized in *Greenlaw v. United States*, 554 U.S. 237 (2008), "in both civil and criminal cases, in both the first instance and on appeal, we follow the principle of party presentation," under which "we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Id.* at 243. To allow appellate courts to resurrect, on the state's behalf, an affirmative defense the state itself had forfeited, would mark a sharp departure from this important and enduring tradition.

II. The State's Declaration Before the District Court That it "Will Not Challenge, but Is Not Conceding, the Timeliness of Wood's Habeas Petition" Amounted to a Deliberate Waiver of any Statute of Limitations Defense it May Have Had.

By recognizing the existence of a potential statute of limitations defense but declaring that it would not raise it, the state manifested an intentional relinquishment of its right to assert the defense. Thus, even assuming that appellate courts possess the general authority to raise a § 2244(d) limitations defense *sua sponte*, the Tenth Circuit abused its discretion in doing so here. *See Day*, 547 U.S. at 202 ("[W]e would count it an abuse of discretion to override a State's deliberate waiver of a limitations defense.").

A. Because the state deliberately waived the limitations defense in the district court, the Tenth Circuit abused its discretion by raising the defense *sua sponte*.

For the reasons set forth in Argument I, *Day's* holding that a district court may *sua sponte* raise a § 2244(d) limitations defense should not be extended to appellate courts. However, assuming arguendo that appellate courts may raise a statute of limitations defense *sua sponte*, the Tenth Circuit still abused its discretion here when it applied the statute of limitations on its own initiative to defeat Wood's claims, which the district court had decided on the merits.

Despite the Tenth Circuit's insistence that it had the authority to affirm the district court's ruling on any ground supported by the record, the Tenth Circuit acknowledged that *Day* would prohibit it from declaring Wood's petition untimely if the state had deliberately waived the defense in the district court. App. 139a-140a n.2. The Tenth Circuit determined, however, that the state's representation that it "will not challenge, but [is] not conceding" the timeliness issue was not a deliberate waiver. The Tenth Circuit's determination is not supported by the record.

In both its pre-answer response and in its answer, the state identified a possible argument that the petition was untimely, and then informed the court that it was not challenging timeliness. The state's pleadings show both that the state was aware of a possible argument that the petition was untimely and that it elected not to raise a timeliness defense. The pleadings thus constitute clear manifestation of an intentional relinquishment of a known right. Nothing more is required for a deliberate waiver, which a court is not at "liberty to disregard." *See Day*, 547 U.S. at 202, 209 n.11.

1. The state's declarations to the district court

As detailed above, *supra* at 11-13, the state informed the district court, in both its pre-answer and answer, that it would not be challenging the timeliness of Wood's petition, though it did not concede the petition was timely. The precise language used by the state in its pleadings is set forth below.

> As previously noted, Wood filed postconviction motions in the state district court in 1995 and 2004. It is clear that if Wood had filed only the 2004 motion his habeas petition would be untimely because the motion was filed long after his time for filing a habeas petition had passed. But it is unclear how the 1995 postconviction motion, which apparently was never ruled upon, affects the timeliness of Wood's habeas petition. While it is certainly arguable that the 1995 postconviction motion was abandoned before 1997 and thus did not toll the AEDPA statute of limitations at all, [citation omitted], Respondents will not challenge, but are not conceding, the timeliness of Wood's habeas petition in this pre-answer response.

App. 70a (Pre-answer).

> Under 28 U.S.C. § 2244(d), a one-year limitations period applies to applications for writ of habeas corpus. As noted in the pre-answer response, the Respondents are not challenging, but do not concede, the timeliness of the petition. The

> Respondents hereby incorporate the arguments raised in the pre-answer response into this answer.

App. 87a (Answer).

2. The Tenth Circuit erred when it concluded that the state's declarations did not constitute a deliberate waiver of any timeliness defense.

The Tenth Circuit examined the two preceding quotations, which are taken verbatim from the state's pleadings, and characterized them as a "cryptic response to the timeliness question." App. 139a n.2. The court stated that, "[w]hile the precise import of [the state's declaration] eludes us, we conclude it is not a deliberate waiver." *Id.* The court based this conclusion partly on the fact that the state identified a potential timeliness argument in its pre-answer response. *Id.* But that fact properly supports the conclusion that the state *did* waive the defense, not that it did not, because in marked contrast to *Day*, it shows that the state was well aware of a potential argument but consciously chose not to make it in the district court. It is not necessary for a respondent to concede that a petition is timely for it to decide that it will not challenge timeliness, and this is what happened here.

It is beyond dispute that the state knew that the timeliness of Wood's petition was a potential issue in the case. Indeed, the district court had initially dismissed Wood's petition as untimely after subjecting it to a preliminary review pursuant to Habeas Rule 4. App. 41a. After reconsidering that decision, the district court ordered the state to file a pre-answer response and specifically required the state to assert whether it intended to raise a § 2244(d) limitations defense. App. 62a, 64-66a. In response, the state noted the existence of Wood's 1995 state postconviction motion, asserted that its tolling effect was "unclear," and noted the existence of a possible argument that the motion had been abandoned. App. 70a. The respondents, however, deliberately chose not to assert that argument, telling the district court that they "will not challenge, but are not conceding" the timeliness of Wood's petition. App. 70a. By any measure, this conscious choice by the state to refrain from asserting a position it knew to be available to it amounts to an intelligent, deliberate waiver.

This is not a case in which the state overlooked a possible timeliness defense or, as in *Day*, made an inadvertent "computation error." *Day*, 547 U.S. at 204. Indeed, in *Day*, this Court was willing to overlook the state's failure to assert the defense precisely because the state had only made an "inadvertent error" in tallying up the relevant days, not a deliberate decision to forgo the defense, as occurred here. *Id.* at 211.

B. The Tenth Circuit also abused its discretion by raising the § 2244(d) timeliness defense *sua sponte* when the state's decision not to raise the defense could have been strategic.

This Court has repeatedly "expressed [its] reluctance to adopt rules that allow a party to withhold raising a defense until after the 'main event' in this case, the proceeding in the District Court – is over." *Granberry v. Greer*, 481 U.S. 129, 132 (1987) (citing *Wainwright v.*

Sykes, 433 U.S. 72, 89-90 (1977)). *Day* incorporated this reluctance when it expressly prohibited district courts from disregarding a state's deliberate waiver of a § 2244(d) defense. *See id.*, 547 U.S. at 211 n.11.

The record in this case not only shows that the state deliberately waived any statute of limitations defense, but it also shows that the state's decision to do so was likely a strategic one, designed to streamline the litigation by focusing on the issues that lent themselves to more straightforward argument. *Compare id.* ("nothing in the record suggests that the State 'strategically' withheld the defense or chose to relinquish it").

The question whether Wood had abandoned his 1995 state postconviction motion so that it no longer tolled the limitations period was a complex one.[10] And a decision by the state to raise and argue the issue in the district court may well have resulted in the appointment of counsel or an evidentiary hearing, neither of which could ever benefit the state.[11]

---

[10] The complexity of the abandonment issue is demonstrated by the briefing that was filed in response to the Tenth Circuit's certificate of appealability. The parties' arguments on the timeliness issue can be found in *Wood v. Milyard*, No. 09-1348, Appellant's supplemental brief at 18-23, filed 5.5.10; Appellee/ Respondent's supplemental brief at 17-23, filed 7.26.10; and Appellant's reply brief at 1-8, filed 9.9.10.

[11] Just by way of example, one way counsel could have provided assistance to Wood and, in doing so, complicated the litigation for the state, involves the four claims the state successfully argued were unexhausted. The magistrate judge offered Wood two choices: dismiss the unexhausted claims and pursue the claims remaining, or dismiss the entire petition as a

The difficulty of the abandonment issue was heightened by the fact that the Colorado courts had only recently recognized the possibility that a properly filed state postconviction motion could be abandoned or subject to the doctrine of laches. *See People v. Robbins*, 107 P.3d 384 (Colo. 2005) (applying doctrine of laches, for the first time, to bar a postconviction claim where the motion was filed 35 years after conviction became final, notwithstanding Colo. Rev. Stat. § 16-5-402(1), which provides there is no time limit for seeking postconviction review under circumstances of defendant's case); *see also People v. Valdez*, 178 P.3d 1269 (Colo. App. 2007) (holding, as matter of first impression, that failure to pursue a postconviction motion for 7 years after it was filed raised question of fact as to whether defendant had abandoned his claim, requiring a hearing on the issue).

---

mixed petition, i.e., a petition with both exhausted and unexhausted claims. App. 75a. In most circumstances, individuals will choose to dismiss their unexhausted claims, because dismissing the entire petition will often result in all of the petitioner's claims being time barred. However, if counsel had been appointed for Wood in the district court, counsel could have pursued a third alternative by requesting a stay and abey order from the court. *See Rhines v. Weber*, 544 U.S. 269, 278-279 (2005) (district court has discretion to stay a mixed petition to allow habeas petitioner to present his unexhausted claims to the state court in the first instance, then return to federal court for review of his perfected petition and all of his claims). Such an order would have complicated matters for the state, but would have benefitted Wood by affording him an opportunity (1) to obtain a favorable result in state court on the merits of an unexhausted claim, or (2) to exhaust additional claims in state court so that the claims could be reviewed in federal court. As it was, Mr. Wood, acting pro se, when given the choice of having his entire petition dismissed or having four of the six claims he raised dismissed, chose the latter course.

Had the district court in Wood's case deemed a hearing necessary – a realistic possibility given both the intricacy of Colorado law and the difficulty of accurately determining the factual question of whether abandonment had occurred – appointment of counsel would have been required. *See* Habeas Rule 8(c). Even if the district court had seen fit to proceed without a hearing, it may well have decided to appoint counsel due to the complexity of the issue alone. *See* 18 U.S.C. § 3006A(a)(2)(B) (court may appoint counsel for § 2254 petitioner whenever it "determines that interests of justice so require"). Notably, when the Tenth Circuit included the abandonment issue in its certificate of appealability, it saw fit to appoint counsel. App. 129a.

In sharp contrast to the state's conduct in this case, in *Day*, the state's concession of timeliness and non-assertion of the defense was "an inadvertent error," and "nothing in the record suggest[ed] that the State 'strategically' withheld the defense or chose to relinquish it." *Day*, 547 U.S. at 211. *Day* made clear that a federal court would not be free to disregard a strategic, deliberate choice by the state to withhold a § 2244(d) limitations defense. *Id.*

Here, the state consciously elected to forgo the litigation of any timeliness or abandonment issue in the district court. The state recognized a possible abandonment issue and disclosed it to the court, and, at the same time, the state declared that "Respondents will not challenge," App. 70a, and "are not challenging" the timeliness of the petition. App. 87a. This is clearly indicative of a strategic choice on the state's part. Instead of attempting to prevail on timeliness grounds, the state elected to argue that several of Wood's claims were unexhausted, that the double jeopardy claim was procedurally defaulted and that both exhausted claims should be denied on the merits. App. 75a, 84a-94. This was no inadvertent error.

The state's choices simplified the issues before the district court, reduced the possibility of an evidentiary hearing and the possibility that the district court would appoint an attorney to represent Wood. The state's choice not to raise timeliness fended off potential complications, a quintessentially strategic decision, and the Tenth Circuit should have held the state to its choice.

The Tenth Circuit abused any discretion it had to raise the § 2244(d) limitations defense *sua sponte* for the first time on appeal when it discarded the state's choice to "strategically" withhold and waive the limitations defense. *See Day,* 547 U.S. at 211, n.11.

APPENDIX

APPENDIX — RELEVANT RULES

Wood v. Milyard et al., Case No.: 10-9995

Rules Governing Section 2254 Cases in the United States District Courts

Habeas Rule 4: Preliminary Review; Serving the Petition and Order

The clerk must promptly forward the petition to a judge under the court's assignment procedure, and the judge must promptly examine it. If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner. If the petition is not dismissed, the judge must order the respondent to file an answer, motion, or other response within a fixed time, or to take other action the juge may order. In every case, the clerk must serve a copy of the petition and any order on the respondent and on the attorney general or other appropriate officer of the state involved.

Habeas Rule 5: The Answer and the Reply

(a) **When Required.** The respondent is not required to answer the petition unless a judge so orders.

(b) **Contents: Addressing the Allegations; Stating a Bar.** The answer must address the allegations in the petition. In addition, it must state whether any claim in the petition is barred by a failure to exhaust state remedies, a procedural bar, non-retroactivity, or a statute of limitations.

Habeas Rule 12: Applicability of the Federal Rules of Civil Procedure

The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules.

Federal Rules of Civil Procedure

FRCP Rule 1: Scope and Purpose of Rules

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

FRCP Rule 8(c): General Rules of Pleading

....

(c) **Affirmative Defenses**

(1) *In General.* In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including:

....

- laches;
- statute of limitations; and
- waiver.

FRCP Rule 12(b): Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

(b) **How to Present Defenses** . Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;

(2) lack of personal jurisdiction;

(3) improper venue;

(4) insufficient process;

(5) insufficient service of process;

(6) failure to state a claim upon which relief can be granted; and

(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

FRCP Rule 15: Amended and Supplemental Pleadings

(a) **Amendments Before Trial.**

(1) *Amending as a Matter of Course.* A party may amend its pleading once as a matter of course within:

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

(2) *Other Amendments.* In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

FRCP Rule 81: Applicability in General

(a) **To What Proceedings Applicable.**

. . . .

(2) These rules are applicable to proceedings for admission to citizenship, habeas corpus, and quo warranto, to the extenet that the practice is such proceedings is not set forth in statutes of the United States, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Proceedings, and has heretofore conformed to the practice in civil actions.

RESPONDENT'S BRIEF

RECORD
AND
BRIEFS

No. 10-9995

IN THE

Supreme Court of the United States

PATRICK WOOD,

Petitioner,

v.

KEVIN MILYARD, WARDEN, STERLING
CORRECTIONAL FACILITY, *et al.*,

Respondents.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

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QUESTIONS PRESENTED

1. Does an appellate court have the authority to raise *sua sponte* a 28 U.S.C. § 2244(d) statute of limitations defense?

2. Does the State's declaration before the district court that it "will not challenge, but [is] not conceding, the timeliness of Wood's habeas petition," amount to a deliberate waiver of any statute of limitations defense the State may have had?

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INTRODUCTION

The overriding purpose of the federal Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") is to "further the principles of comity, finality, and federalism." *Williams v. Taylor*, 529 U.S. 420, 436 (2000). The statute's one-year limitations period is central to that mission. *See* 28 U.S.C. § 2244(d). It "quite plainly serves the well-recognized interest in the finality of state court judgments" and thus "reduces the potential for delay on the road to finality by restricting the time that a prospective federal habeas petitioner has in which to seek federal habeas review." *Duncan v. Walker*, 533 U.S. 167, 179 (2001). AEDPA thus encourages federal courts to screen and dismiss plainly untimely habeas petitions.

But the fact that Petitioner ("Wood") did not timely file his federal habeas petition is not at issue here. Wood filed the relevant habeas petition eighteen years after his murder conviction became final and seven years after AEDPA's limitations period expired. Moreover, even under Wood's theory that his petition is timely because a 1995 state postconviction motion that he failed to pursue continues to toll the federal limitations period, his petition is procedurally barred for nonexhaustion in any event. Instead, Wood sought this Court's review of his conviction because the United States Court of Appeals for the Tenth Circuit raised *sua sponte* the timeliness of his petition in the course of granting a certificate of appealability ("COA") and ultimately dismissed his petition on that ground.

According to Wood, the Tenth Circuit lacked the authority to raise the Section 2244(d) limitations issue because Respondent ("the State") "forfeited or waived" the issue by not preserving it before the district court. Brief for Petitioner ("Pet'r Br.") 17. Wood is incorrect. His argument conflates forfeiture and waiver—distinct concepts with distinct consequences. Appellate courts have the authority to raise forfeited issues under appropriate circumstances. *See Granberry v. Greer*, 481 U.S. 129 (1987). That authority is restricted only when the State intelligently waives the issue. *See Day v. McDonough*, 547 U.S. 198, 202 (2006). The latitude to raise a forfeited issue should be especially wide here given AEDPA's goal of promoting finality and the courts of appeals' unique role in screening habeas appeals. If courts cannot add a key threshold issue to a COA, they may decline to authorize appeals in cases where they conclude that the district court and the State missed a lurking procedural defect. The Tenth Circuit instead granted the COA and afforded Wood the opportunity to address the timeliness issue.[1]

The Tenth Circuit had the authority to raise the issue in this case because the State had not intelligently waived the Section 2244(d) limitations defense. Unsure of when Wood's 1995 petition had been abandoned and laboring under a mistaken understanding of the law, the State took an equivocal position on the limitations issue, informing the district court that it did not "challenge" but was not "conceding" the timeliness of Wood's petition. That statement was certainly inartful and may well have been insufficient to preserve the issue. But it was not the "intentional relinquishment or abandonment of a known right." *United States v. Olano*, 507 U.S. 725, 733 (1993) (citations and quotations omitted).

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[1] Under Wood's own theory, this Court cannot reach the questions presented. On appeal, Wood addressed the timeliness issue on the merits in response to the Court's COA, but he did not assert that the State had waived or forfeited the Section 2244(d) limitations defense until his panel-rehearing petition. Under circuit precedent, an argument "made for the first time in [a] petition for rehearing and . . . not initially presented to the panel . . . is . . . forfeited." *United States v. Andrus*, 499 F.3d 1162, 1163 (10th Cir. 2007). And it has been "the traditional practice of this Court . . . to decline to review claims raised for the first time on rehearing in the court below." *Wills v. Texas*, 511 U.S. 1097, 1097 (1994) (mem.) (O'Connor, J., concurring in denial of certiorari); *cf. Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001).

Accordingly, the Tenth Circuit had the authority to decide the case on the forfeited ground so long as, among other reasons, the State was not strategically withholding the defense. The State's behavior here was anything but strategic. It was the State (not Wood) that informed the district court of the existence of the 1995 postconviction motion that Wood relied on for his timeliness argument. The State did not seek to avoid the subject in the district court only to spring it on Wood before the Tenth Circuit. It provided the district court with the relevant information at the earliest stages of this litigation, but failed to fully assert the limitations defense because of its erroneous belief that the 1995 motion had to have been abandoned before 1997 to make Wood's habeas petition untimely. JA 70a. It then lived with that error until the Tenth Circuit asked the parties to brief the issue in conjunction with the decision to grant the COA. Under the circumstances of this case, the court of appeals appropriately exercised its authority to raise the Section 2244(d) limitations issue and dismiss Wood's habeas petition as untimely.

STATEMENT

1. On January 27, 1986, Patrick Wood walked into a pizza delivery store in Westminster, Colorado, armed with a concealed 357 Magnum revolver. After ordering a pizza, Wood pointed the gun at the store's assistant manager, Matthew Sparks, and yelled, "Give me the money! Give me the money!" As Sparks turned toward him, Wood shot Sparks in the head. Wood then pointed the gun at another employee, Keith Knutson, and again demanded money. After Knutson ran to the back office to open the safe, Wood threatened to shoot another employee, Dana Chavez, who was hiding behind an oven. Before Knutson could return, Chavez tackled Wood and yelled for Knutson to help him. Together the two men were able to restrain Wood until police arrived. Sparks was pronounced dead at the scene. Vol. 6 at 26-29, 37, 39-40, 43-49, 51-53, 83-87, 115, 140-41; Vol. 7 at 4-5, 31, 39-41.[2]

2. Wood was charged with first-degree murder after deliberation, felony murder, aggravated robbery, and two counts of felony menacing. A jury found Wood guilty of aggravated robbery and felony menacing but was unable to reach a verdict on the murder charges. In exchange for the prosecution's agreement not to seek the death penalty, Wood waived his right to a jury trial on the murder charges. After holding a bench trial, the court found Wood guilty of felony murder and second-degree murder. Wood was sentenced to life imprisonment for murder with parole after 40 years (merging the robbery and murder counts) and two concurrent four-year terms

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[2] Citations to "Vol." are to the state court record. Citations to "Doc." are to the district court docket in the present case. Citations to "JA" are to the Joint Appendix.

for menacing. The Colorado Court of Appeals affirmed Wood's convictions, and, in 1989, the Colorado Supreme Court denied certiorari. *See* Doc. 15-1; 15-2 at 2; 15-4 at 11; 15-10 at 1; Vol. 7 at 131-34, 139.

3. In 1994, Wood filed a federal habeas petition in the District Court for the District of Colorado. Because Wood had not exhausted his state court remedies, the district court dismissed his petition. *See Wood v. Furlong*, No. 94-cv-219-JLK-RMB (D. Colo. Mar. 22, 1995); Doc. 15-2 at 5, 9.

4. In June 1995, Wood filed a *pro se* motion in Colorado state court to vacate his sentence under Colo. R. of Crim. P. 35(c). Wood argued that double jeopardy barred his convictions for both felony murder and second-degree murder, that his trial counsel was ineffective in advising him to testify, and that his interrogation statements should have been suppressed. He also filed a motion for appointment of counsel. Four months later, Wood filed a motion requesting a ruling on his motions. In December 1995, the state court granted Wood's motion for counsel, but took no other action in the case. The case then remained inactive for more than eight years.[3] Doc. 15-3 at 6-9, 13; Doc. 15-4 at 12.

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[3] The state court docket indicates that Wood wrote a letter to the court in April 2004. The contents of the letter are unknown, however, as the letter is not in the state court file. Doc. 15-4 at 13. It does not appear that Wood took any affirmative steps to pursue resolution of the 1995 state postconviction motion. *See* JA 142a ("It was not until April 2004, when he sent the now-missing letter to the court, and then in August 2004, when he filed a new postconviction application, that [Wood] showed any interest in continuing to pursue relief from his convictions and sentence.").

5. In August 2004, Wood filed a second (and separate) *pro se* motion in Colorado state court to vacate his sentence under Colo. R. of Crim. P. 35(c). Wood again argued that his conviction violated double jeopardy, but raised a different ineffective assistance of counsel claim. The first page of his motion prominently stated: "No other postconviction proceedings [have been] filed." Doc. 15-5 at 1. The court denied the motion, finding Wood's double jeopardy claim to be time-barred under state law and rejecting his ineffective assistance claim on the merits. The Colorado Court of Appeals affirmed, and the Colorado Supreme Court denied certiorari on February 5, 2007. Doc. 15-6; Doc. 15-10; Doc. 15-12 at 21.

6. On February 5, 2008, exactly one year after the Colorado Supreme Court denied certiorari, Wood filed another federal habeas petition in the District Court for the District of Colorado. Doc. 1. Wood's petition raised five constitutional claims: (1) double jeopardy; (2) involuntary waiver of right to a jury trial; (3) violation of privilege against self-incrimination; (4) ineffective assistance of counsel; and (5) conviction obtained under an unconstitutional state statute. *Id.*

In that 2008 federal habeas petition, Wood identified only the 2004 state postconviction motion; he did not mention the 1995 state postconviction motion. JA 17a-18a. The district court ordered Wood to show cause why the petition should not be denied as time barred. JA 32a.[4]

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[4] The issuance of the show-cause order was in line with the District of Colorado's practice of "order[ing] applicants in habeas corpus actions to show cause why the applications should not be denied as time-barred or for failure to exhaust state court remedies if either or both of those affirmative defenses appeared

On its face, Wood's federal habeas petition was clearly untimely. As the show-cause order explained, "Wood's conviction and sentence became final prior to April 24, 1996," and "[t]herefore, in the absence of any reason to toll the limitations period, Wood should have initiated this action prior to April 24, 1997."[5] *Id.* Wood's 2004 state postconviction motion was filed well after the one-year federal limitations period had expired. Although he filed a lengthy response, Wood again failed to identify the 1995 state postconviction motion. Doc. 4.

The district court dismissed Wood's petition as time barred under AEDPA. JA 45a-46a. Because Wood "filed his postconviction proceeding on August 19, 2004, over seven years after the one-year limitations period expired,"

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to be relevant based on the allegations in the applications." *Denson v. Abbott*, 554 F. Supp. 2d 1206, 1207 (D. Colo. 2008). On March 11, 2008, however, the Tenth Circuit held that a district court may not dismiss a petition *sua sponte* simply because it lacks sufficient information to determine timeliness. *Kilgore v. Att'y Gen.*, 519 F.3d 1084, 1089 (10th Cir. 2008). In response, the district court now regularly orders the State to file a "pre-answer response" when these issues arise. The Tenth Circuit has approved of this practice. *See Garza v. Davis*, 596 F.3d 1198, 1205 (10th Cir. 2010).

[5] AEDPA imposes a one-year limitations period for filing a federal habeas petition. 28 U.S.C. § 2244(d)(1). Because Wood's conviction became final before AEDPA took effect, the federal limitations period began running on AEDPA's effective date, April 24, 1996, giving Wood one year from that date (in the absence of tolling) to file a federal habeas petition. *See Carey v. Saffold*, 536 U.S. 214, 217 (2002); 28 U.S.C. § 2244(d)(2) (allowing the one-year period to be tolled for the time "during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending").

the 2004 "postconviction proceeding did not toll the one-year limitations period." JA 45a. The district court also rejected Wood's claims that he was entitled to equitable tolling. JA 45a-46a.

Wood then filed a motion for reconsideration in which he failed for a third time to identify his 1995 state postconviction motion. JA 47a-60a. Wood instead argued, among other things, that "the AEDPA time limitations do not apply to him at all," that he was entitled to statutory tolling based on the federal habeas petition he previously filed in 1994, and that he was entitled to equitable tolling because he diligently pursued his constitutional claims. JA 49a-51a, 55a-59a.

The district court granted the motion without explanation and ordered the State "pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts to file a Pre-Answer Response limited to addressing the affirmative defenses of timeliness . . . and/or exhaustion of state court remedies."[6] JA 62a, 64a-65a. The district court instructed the State that it "may not file a dispositive motion as [its] Pre-Answer Response, or an Answer, or otherwise address the merits of the claims in response to this Order." JA 65a. The State was further instructed that, if it did not intend to assert either defense, the State "must notify the Court of that decision in the Pre-Answer Response." *Id.*

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[6] Habeas Rule 4 authorizes district courts to "order the respondent to file an answer, motion, or other response within a fixed time, or to take other action the judge may order." Rules Governing Section 2254 Cases in the United States District Courts Rule 4 ("Habeas Rules"). Rule 4 "is designed to afford the judge flexibility in a case where either dismissal or an order to answer may be inappropriate." Habeas Rule 4 (1976 Advisory Committee Notes).

In its pre-answer response, the State notified the district court that Wood had filed a postconviction motion in 1995 and that the state court had never ruled on the motion. Doc. 15 at 2. After discussing AEDPA's one-year statute of limitations and its tolling mechanism, the State addressed the effect of Wood's previously undisclosed state motion on the timeliness of his petition:

> As previously noted, Wood filed post-conviction motions in the state district court in 1995 and 2004. It is clear that if Wood had filed only the 2004 motion his habeas petition would be untimely because the motion was filed long after his time for filing a habeas petition had passed. But it is unclear how the 1995 postconviction motion, which apparently was never ruled upon, affects the timeliness of Wood's habeas petition. While it is certainly arguable that the 1995 postconviction motion was abandoned before 1997 and thus did not toll the AEDPA statute of limitations at all, *see People v. Mamula*, 847 P.2d 1135 (Colo. 1993) (Crim. P. 35(b) motion for reduction of sentence deemed abandoned as a matter of law where circumstances were such that 20-month delay in seeking a ruling was unreasonable), Respondents will not challenge, but are not conceding, the timeliness of Wood's habeas petition in this pre-answer response.

JA 70a. The State argued that Wood's petition should be dismissed as unexhausted because it included claims that were not presented to the state courts. Doc. 15 at 10. In his reply, Wood argued that his petition should be deemed timely because the State had not challenged it on that ground. JA 71a-72a.

On August 15, 2008, the district court held that only Wood's double jeopardy and jury waiver claims were exhausted. Doc. 17 at 5-6. The district court afforded Wood the option to proceed on his exhausted claims, but did not address the timeliness issue. *Id.* After Wood elected to proceed with only his exhausted claims, Doc. 18 at 4, the district court accepted Wood's election, and then ordered the State to file an answer. JA 81a-83a. Again, however, the district court declined to address the timeliness of Wood's petition. The State's answer addressed the merits of Wood's claims, JA 91a-93a, and summarized the State's position on timeliness, which it had first set forth in its pre-answer response:

> Under 28 U.S.C. § 2244(d), a one-year limitations period applies to applications for writ of habeas corpus. As noted in the pre-answer response, the Respondents are not challenging, but do not concede, the timeliness of the petition. The Respondents hereby incorporate the arguments raised in the pre-answer response into this answer.

JA 87a.

The State also reasserted its exhaustion argument and raised a new procedural default argument. JA 88a-89a. The district court rejected Wood's double jeopardy and involuntary waiver claims on the merits. The district court did not address the timeliness of Wood's petition or procedural default. JA 105a-111a.

7. Wood timely appealed. The court of appeals granted a COA on Wood's double jeopardy and involuntary waiver claims. It noted, however, that "both of these claims might be subject to dismissal due to the potential untimeliness of Wood's application for habeas corpus." JA 119a. The court of appeals considered the petition's timeliness an "open question" as the district court had not resolved the issue, and it stressed that the "limitations period contained in AEDPA is central to its purpose of bringing finality to state court criminal judgments." JA 121a-122a.[7] The court appointed counsel for Wood and directed the parties to address both the merits and "the timeliness of Wood's application . . . and any state procedural rules that might bar [the court's] consideration of [Wood's] claims." JA 129a. Wood did not argue that the State had waived the Section 2244(d) limitations defense or that the issue was not properly before the court for another reason. Wood limited his argument to why his petition was timely under Section 2244(d). *See* Brief for Appellant at 19-23 (filed May 5, 2010); Reply Brief at 1-8 (filed Sept. 9, 2010).

The court of appeals affirmed, dismissing Wood's petition as untimely. As the court explained, the only way Wood's petition could be timely would be if his 1995 state petition "remained pending, thereby tolling the limitations period, from April 24, 1996, until August 30, 2004, the day he filed his second postconviction application." JA 141a.

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[7] The court of appeals also ordered the parties to brief whether Wood's double jeopardy claim was barred by the independent and adequate state ground doctrine. JA 126a.

But Wood had "made no attempt to communicate with the court for any reason for over eight years," had informed the state court in 2004 that "[n]o other postconviction proceedings [had been] filed," and had repeatedly failed to mention the motion in the proceedings below. JA 142a-143a. As a consequence, the court of appeals held that Wood had abandoned the 1995 state postconviction motion. *Id.* It also noted that under Wood's argument his 1995 state postconviction motion would still be pending. JA 143a.

Because "any break in the pendency of the 1995 motion after AEDPA's enactment renders Wood's 2008 federal habeas petition untimely," the court of appeals recognized it was unnecessary to determine precisely when the petition had been abandoned. JA 143a. Wood waited an entire year from when the Colorado Supreme Court had denied certiorari to file his federal habeas petition. Accordingly, AEDPA's tolling provision was inapplicable and there was "no time left to account for *any* untolled period between AEDPA's April 24, 1996 enactment and Wood's 2004 post-conviction application." JA 144a.

The court of appeals also concluded that the Section 2244(d) limitations defense had not been waived. It recognized that it could not "'override a State's deliberate waiver of a limitations defense' and *sua sponte* dismiss a habeas petition." JA 140a n.2 (quoting *Day*, 547 U.S. at 202). It thus reviewed the State's "cryptic response to the timeliness question"—that the State is "not challenging, but [does] not concede, the timeliness of [Wood's] [habeas] petition"—to determine whether the State had deliberately waived the issue. *Id.* While the "precise import of this quotation elude[d]" the court, it ultimately concluded that the State had not deliberately waived the limitations defense because the State's statement "follows an argument as to why Wood's habeas petition would be untimely, and concludes with a refusal to concede that the petition is timely." *Id.* Additionally, the court found its decision to resolve the case on timeliness grounds particularly appropriate because "the issue was raised in the district court and addressed by Wood, the parties have briefed the issue on appeal, and the interests of justice would be served in reaching the timeliness issue given the extensive time period involved." *Id.*

Wood sought panel rehearing. For the first time on appeal, he argued that the State had waived or forfeited the Section 2244(d) limitations defense. *See* Appellant's Petition for Panel Rehearing at 1-8 (filed Jan. 3, 2011). The court of appeals denied the rehearing petition. Wood timely filed a petition for writ of certiorari, which this Court granted.

SUMMARY OF ARGUMENT

Although Wood fails to grapple with it, the key issue in this appeal is whether the State intelligently waived or merely forfeited the Section 2244(d) limitations defense by informing the district court that it was not challenging but also was not conceding the timeliness of Wood's habeas petition. Because that ambiguous statement was not an intelligent waiver, the court of appeals had the authority to reach the forfeited limitations issue. Having made the determination to raise the Section 2244(d) issue given the circumstances of this case, the Tenth Circuit appropriately dismissed Wood's petition as untimely. The decision below should be affirmed.

1. There are three categories into which a party's efforts to address an issue may fall. A party can fully raise and thus preserve an issue for appellate review. At the other extreme, a party may intelligently waive the issue. Finally, a party can do neither and thus forfeit the issue. The different consequences of waiver and forfeiture are critical and central to this dispute. If a party intelligently waives an issue, appellate review generally is foreclosed. But if a party forfeits an issue, an appellate court still may decide the case on that ground even though it was not the basis for the district court's decision. None of the cases on which Wood relies deviates from the rule.

The Court has adhered to this approach in habeas cases. As *Granberry* and *Day* explain, federal courts have the authority to reach a forfeited habeas defense under appropriate circumstances. Contrary to Wood's assertion, *Day* did not confine that authority to the district courts in the context of Section 2244(d). *Granberry* held that the court of appeals could reach a forfeited nonexhaustion defense, and *Day* held that the Section 2244(d) limitations defense should be treated similarly as it also advances AEDPA's interest in federalism, comity, and finality. Thus, there is no justification for distinguishing between those cases and Wood's.

Nor is the rule different when the court of appeals raises the issue *sua sponte*. Appellate courts have inherent authority to raise forfeited issues on their own motion. This Court has itself embraced that authority on a number of occasions. And as reflected in this Court's endorsement of the many decisions in which the courts of appeals have raised claim and issue preclusion on their own motion, it is particularly appropriate to exercise such authority when the forfeited issue implicates important interests beyond the parties. Neither AEDPA nor any other federal law deprives the courts of appeals of this authority in the context of habeas appeals.

Indeed, given the unique nature of habeas practice and the special concerns underlying federal review of state-court convictions, the courts of appeals should have especially wide latitude to consider a forfeited issue that can terminate the appeal expeditiously. AEDPA imposes obligations and procedures that are foreign to ordinary civil litigation. The State is required to address the petition's timeliness and, in Colorado at least, it often assists the district court in performing its gatekeeping function. If this were ordinary civil litigation, the State's first filing could have been a Rule 12 motion to dismiss based on the allegations in Wood's petition. Instead, the particular habeas process used here required the State to file a pre-answer response and forbade it from filing a dispositive motion. It was in the course of following these instructions that the State notified the district court of the 1995 state-court motion and the State's (mistaken) understanding of its potential impact on the habeas petition's timeliness.

AEDPA also imposes unique obligations and procedures on the courts. In addition to the gatekeeping duties that Habeas Rule 4 imposes on district courts, the statute also requires the courts of appeals to review unsuccessful petitions and allow an appeal only where there is a colorable claim for relief. Here, the Tenth Circuit added the Section 2244(d) limitations issue at the COA stage and permitted the appeal to proceed. This allowed Wood the opportunity to address the limitations issue through appointed counsel. Had the Tenth Circuit lacked the authority to raise the forfeited issue, it could well have denied a COA. This Court should not adopt a rule that forces the courts of appeals to choose between denying a COA or allowing an appeal of constitutional issues that it believes to be untimely under AEDPA. It should instead encourage the courts of appeals to follow the sensible example set by the Tenth Circuit in this case.

At bottom, adopting Wood's position would wrongly merge waiver and forfeiture, concepts this Court has been careful to keep distinct. It also would mean that courts of appeals have less discretion to consider a forfeited issue in federal habeas cases than in ordinary civil litigation, a result contrary to Congress' manifest goals, longstanding habeas practice, and this Court's decisions. This case illustrates precisely why such an alteration to existing law is unnecessary and unwise. Wood filed his federal habeas petition 22 years after he murdered Matthew Sparks, 18 years after his convictions became final, and nearly 12 years after Congress imposed a one-year time limit on such petitions. The only arguable basis for finding the petition timely is a state-court motion that Wood filed 13 years earlier that he not only abandoned, but that he neglected to mention until after the State brought it to the district court's attention in its pre-answer response. The State's inartful handling of this issue should not have forced the Tenth Circuit to devote substantial resources to resolve Wood's constitutional claims when his habeas petition was clearly untimely.

2. As this Court has explained many times and in many settings, an intelligent waiver is the intentional relinquishment of a known right. There must be a clear

intent to relinquish the issue and the decision must not be based on a mistake of fact or law. Thus, an equivocal or ambiguous statement is not an intelligent waiver. To reach a contrary conclusion here, the Court would need to abandon its longstanding framework or create a special rule for habeas defenses. As *Day* makes clear, that would not be warranted.

The "cryptic comment" at the heart of this dispute—in which the State refused to concede but did not contest the petition's timeliness—was not an intelligent waiver. The statement was not an intentional relinquishment of the issue because the one thing the State made clear was that it was not conceding the petition's timeliness. As in *Day*, moreover, the statement was not a knowing relinquishment because it was predicated on a mistake of law. Although the State identified the Section 2244(d) limitations issue in the early stages of this litigation, it cannot deny that its incomplete and inartful handling of it failed to preserve the issue. An equivocal statement such as this thus may be insufficient to preserve the issue. Under any reasonable definition, however, the statement falls far short of this Court's standard for an intelligent waiver. Therefore, the Tenth Circuit retained the discretion to consider it and dismiss the petition as untimely if it believed that circumstances justified that action.

3. Whether the court of appeals' determination that it was equitable to decide the case on timeliness grounds is not included within the questions presented. Regardless, the Tenth Circuit did not abuse its discretion. Before reaching the forfeited issue, under *Day* and *Granberry* the Tenth Circuit was required to provide Wood notice and an opportunity to be heard, determine whether he would

be prejudiced by addressing the issue, decide whether the interests of justice would be better served by deciding the timeliness question or deciding the case on the merits, and ensure that the State had not strategically withheld the defense.

The court of appeals followed these instructions to the letter. It notified Wood that it would be reaching the issue and afforded him the opportunity to address it through appointed counsel. Notwithstanding Wood's wild hypothetical scenarios, there was no evidence suggesting he was prejudiced by the decision to resolve the issue as timeliness had been an issue in the case from the beginning. And the Tenth Circuit reasonably concluded that "the interests of justice would be served in reaching the timeliness issue given the extensive time period involved." JA 140a n.2.

Finally, contrary to Wood's suggestion, the State did not strategically withhold the limitations defense. It was the State that initially brought the 1995 state-court motion to the district court's attention and mistakenly suggested that it might render Wood's petition timely. Moreover, the State did not attempt to prevail on the merits and save the procedural defense for appeal in case it was unsuccessful. The State raised the issue along with other procedural defenses before the district court; and while the State did not fully contest the issue, it pointedly refused to take it off the table. Furthermore, it was the Tenth Circuit—not the State—that raised the issue at the COA stage and asked the parties to brief it. It would have been a curious strategy to forfeit a timeliness argument in the hope that the Tenth Circuit would raise the issue in the course of granting a COA that the State urged it to deny. The

State's handling of the Section 2244(d) limitations issue was flawed. But it was anything but strategic.

ARGUMENT

The Court should affirm the decision below. First, the court of appeals had the authority to raise *sua sponte* Wood's failure to comply with the one-year limitations period set forth in Section 2244(d) so long as the State had not intelligently waived the issue before the district court. Second, the State did not intentionally and knowingly waive the issue in its pre-answer response or answer. Third, although the question is not before the Court, the Tenth Circuit appropriately exercised its authority to reach the forfeited issue and, in turn, to dismiss Wood's habeas petition as untimely.

I. The Court Of Appeals Had The Authority To Raise *Sua Sponte* The Section 2244(d) Limitations Defense

Wood argues from the flawed premise that the Tenth Circuit lacked authority to raise the Section 2244(d) limitations defense on its own motion because the State "waived or forfeited" that issue before the district court. Pet'r Br. 20. But as Wood acknowledges, *see* Pet'r Br. 17 n.6, waiver and forfeiture are not interchangeable concepts. Waiver is the intentional relinquishment of a known right, while forfeiture is merely the failure to preserve an issue for further review. *Olano*, 507 U.S. at 733. This distinction is crucial. The courts of appeals retain wide latitude to resurrect a forfeited defense when (as here) circumstances warrant it, whereas waiver forecloses that option. *See Granberry*, 481 U.S. at 132-36; *Day*, 547 U.S. at 202.

As cases like *Granberry* and *Day* demonstrate, the discretion to resurrect forfeited issues has particular force in the habeas setting where interests of federalism, comity, and finality are at their apex. AEDPA and the Habeas Rules charge federal courts with the obligation to weed out procedurally improper and otherwise meritless habeas petitions and to ensure that only those habeas petitions with colorable claims for relief obtain appellate review. Accordingly, the Tenth Circuit acted consistently with its mandate in raising the Section 2244(d) limitations issue on its own motion.

A. The courts of appeals have the well-recognized authority to raise *sua sponte* an issue that was not preserved for appellate review so long as it was not intelligently waived.

Wood repeatedly argues that the State "waived or forfeited" the Section 2244(d) limitations defense by not preserving it for appellate review. Pet'r Br. 20; *see also id.* 26 ("If a litigant fails to assert an affirmative defense in the district court, it is waived or forfeited for purposes of appeal."); *id.* 17, 25, 27-28 (same). As this Court has made clear, however, waiver and forfeiture are distinct concepts with different consequences. By merging them, Wood obscures a central issue in this case: whether the State's failure to preserve the Section 2244(d) limitations issue was an intelligent waiver *or* mere forfeiture. Because the State did not intelligently waive the limitations defense, the court of appeals retained the discretion to resolve the case on that ground.

1. Although waiver and forfeiture are often "confused," they are "distinct" concepts. *United States v. Leggett*, 162

F.3d 237, 249 (3d Cir. 1998). "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" *Olano*, 507 U.S. at 733 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (other citations omitted)); *see also Kontrick v. Ryan*, 540 U.S. 443, 458 n.13 (2004); *Puckett v. United States*, 129 S. Ct. 1423, 1428 (2009); *Freytag v. CIR*, 501 U.S. 868, 895 n.2 (1991) (Scalia, J., concurring in part, concurring in the judgment in part). "Unlike waiver, which requires a knowing and intentional relinquishment of a known right, forfeiture results in the loss of a right regardless of the [party's] knowledge thereof and irrespective of whether the [party] intended to relinquish the right." *United States v. Goldberg*, 67 F.3d 1092, 1100 (3d Cir. 1995).

The distinction between waiver and forfeiture is not semantic—the consequences differ significantly. If a party waives an issue, appellate review generally is foreclosed. *See Puckett*, 129 S. Ct. at 1430-31. But if a party forfeits an issue, the court of appeals retains the discretion to "resurrect" it "on [the party's] behalf." *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1474 (2009); *see, e.g., Powell v. Alexander*, 391 F.3d 1, 21 n.24 (1st Cir. 2004) ("This court may, in its discretion, excuse forfeiture, and we choose to do so here to resolve this important issue.") (citing *Chestnut v. City of Lowell*, 305 F.3d 18, 20 (1st Cir. 2002) (en banc) (per curiam); *United States v. Teague*, 443 F.3d 1310, 1314 (10th Cir. 2006). If there has not been an intelligent waiver, "the court of appeals has authority to order correction, but is not required to do so." *Olano*, 507 U.S. at 735.

2. The Court has emphasized the importance of this distinction in the context of federal habeas review. In *Granberry*, the district court dismissed the habeas petition on the merits. On appeal, the State contended, for the first time, that the petitioner had failed to exhaust state remedies. *Granberry*, 481 U.S. at 130. The petitioner argued that "the State had waived that defense by failing to raise it in the district court." *Id.* The Seventh Circuit rejected the petitioner's waiver argument, confronted the exhaustion issue, and dismissed the habeas petition on that ground. *See id.*

This Court affirmed, declining to deem the State's failure to preserve the issue "a procedural default precluding the State from raising the issue on appeal." *Id.* at 131. Yet it also declined to "treat nonexhaustion as an inflexible bar to consideration of the merits of the petition by the federal court" in every case. *Id.* at 132. The Court instead adopted an "intermediate approach" under which the "appellate court is not required to dismiss for nonexhaustion notwithstanding the State's failure to raise it, and the court is not obligated to regard the State's omission as an absolute waiver of the claim." *Id.* at 131, 133. The key question was "whether the interests of comity and federalism [would] be better served by addressing the merits forthwith" or dismissing the habeas petition as unexhausted even though the State did not preserve the issue for appellate review. *Id.* at 134.

Although *Granberry* preceded decisions, such as *Day*, which have clarified the distinction between intelligent waiver and forfeiture, the Court in *Granberry* drew the same line in ruling that the State's failure to preserve the issue of nonexhaustion did not amount to waiver. The

Court acknowledged that the State had not preserved the issue before the district court. *See Granberry*, 481 U.S. at 133. At the same time, the failure to preserve the issue did not foreclose appellate review because there had been no "absolute waiver of the claim." *Id.* In other words, the State's treatment of the exhaustion issue fell into the middle category between preservation and intelligent waiver: it had been forfeited. *See Day*, 547 U.S. at 206 (noting that *Granberry* held "that federal appellate courts have discretion to consider the issue of exhaustion despite the State's failure to interpose the defense at the district-court level").[8]

Schiro v. Farley, 510 U.S. 222 (1994), and *Caspari v. Bohlen*, 510 U.S. 383 (1994), applied this same reasoning to nonretroactivity defenses under *Teague v. Lane*, 489 U.S. 288 (1989). In both cases, the Court reiterated that appellate courts have the authority, but not the obligation, to excuse forfeiture and reach the *Teague* issue. *See Schiro*, 510 U.S. at 229 ("Although we undoubtedly have the discretion to reach the State's *Teague* argument, we will not do so in these circumstances."); *Caspari*, 510 U.S. at 389 (explaining that because the nonretroactivity principle "is not jurisdictional in the sense that [federal courts] must raise and decide the issue *sua sponte* . . . a federal court may, but need not, decline to apply *Teague* if the State does not argue it") (citations and internal quotation marks omitted). Like *Granberry*, these decisions confirm that the courts of appeals retain the authority to address forfeited habeas issues on appeal.

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[8] The Court remanded for further proceedings because the Seventh Circuit had simply assumed it was obligated to address the State's exhaustion argument and thus had "made no attempt to determine whether the interests of justice would be better served by addressing the merits of the habeas petition or by requiring additional state proceedings before doing so." *Granberry*, 481 U.S. at 136.

3. The Tenth Circuit's decision to raise the issue at the COA stage does not alter the equation.[9] "The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Singleton v. Wulff*, 428 U.S. 106, 121 (1976); *see also Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31 (1962). On occasion, this Court has exercised that authority to decide an issue that was neither pressed nor passed on below, *see, e.g.*, *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *Pollard v. United States*, 352 U.S. 354, 359 (1957); *United Bhd. of Carpenters & Joiners of Am. v. United States*, 330 U.S. 395, 412 (1947), and like the Tenth Circuit here, has even done so on its own initiative, *see, e.g.*, *Montejo v. Louisiana*, 129 S. Ct. 2079, 2088 (2009) ("[W]e called for supplemental briefing addressed to the question whether *Michigan v. Jackson* should be overruled.").

The settled approach to claim and issue preclusion illustrates the point. When "a court is on notice that it has previously decided the issue presented, the court may dismiss the action *sua sponte*, even though the defense has not been raised." *Arizona v. California*, 530 U.S. 392, 412 (2000). "This result is fully consistent with the policies underlying res judicata: it is not based solely on the defendant's interest in avoiding the burdens of twice defending a suit, but is also based on the avoidance of unnecessary judicial waste." *Id.* (quotations omitted); *see also Jackson v. N. Bank Towing Corp.*, 213 F.3d 885, 889-90 (5th Cir. 2000) (explaining that the court of appeals "may raise the issue of res judicata *sua sponte* as a means to affirm the district court decision below"); 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure § 4405 (2d ed. 2002) (collecting cases and explaining that claim and issue preclusion "can be raised by an appellate court for the first time on appeal").

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[9] If anything, the Tenth Circuit's decision to raise *sua sponte* the 2244(d) limitations issue demonstrates that the State was not engaging in the gamesmanship that might make it inappropriate to reach the forfeited issue. *See infra* at 49-50.

As a general matter, then, the courts of appeals have inherent authority to raise forfeited legal issues on their own motion. *See Thomas v. Crosby*, 371 F.3d 782, 793 (11th Cir. 2004) (Tjoflat, J., specially concurring) ("It is beyond dispute that, in general, we have the power to consider issues that a party fails to raise on appeal, even though the petitioner does not have the right to demand such consideration."); *see, e.g., Cruz v. Melecio*, 204 F.3d 14, 22 n.7 (1st Cir. 2000); *United States v. Heater*, 63 F.3d 311, 332 (4th Cir. 1995). Raising the preclusion defense *sua sponte* would be ultra vires otherwise, contrary to settled law. In the end, therefore, an appellate court's "refusal to consider arguments not raised is a sound prudential practice, rather than a statutory or constitutional mandate," but "there are times when prudence dictates the contrary." *Davis v. United States*, 512 U.S. 452, 464 (1994) (Scalia, J., concurring); *see also Silber v. United States*, 370 U.S.

717, 717-18 (1962).[10] There is no basis for departing from this general rule in the context of habeas appeals.

4. Indeed, courts of appeals should have especially wide latitude to raise threshold AEDPA issues given the important interests the statute vindicates. As this Court has explained many times, federal review of state-court convictions implicates "[p]rinciples of comity, finality, and federalism. There is no doubt Congress intended AEDPA to advance these doctrines. Federal habeas corpus principles must inform and shape the historic and still vital relation of mutual respect and common purpose existing between the States and the federal courts." *Williams*, 529 U.S. at 436. "While civil in nature, habeas corpus cases are different from ordinary civil cases where only the interests of the parties are involved." *Long v. Wilson*, 393 F.3d 390, 402 (3d Cir. 2004); *see also Calderon v. Thompson*, 523 U.S. 538, 554 (1998) (recognizing "the profound societal costs that attend the exercise of habeas jurisdiction" (internal quotation omitted)). AEDPA's screening procedures are foreign to ordinary civil litigation. Consequently, "it is not exclusively up to the parties to decide whether habeas

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[10] There may even be circumstances when an appellate court can set aside a party's intelligent waiver of an issue. *See Studio Art Theatre of Evansville, Inc. v. City of Evansville, Ind.*, 76 F.3d 128, 130 (7th Cir. 1996). The Court has indicated it may be inappropriate in the habeas context. *See Day*, 547 U.S. at 210 n.11. But given the proliferation of habeas litigation and the failure of AEDPA to fulfill its statutory mission of streamlining habeas litigation, there may be reason to reconsider that determination in an appropriate case. *See* Nancy J. King & Joseph L. Hoffmann, Habeas for the Twenty-First Century 81 (2011). It is not necessary to reevaluate that issue here, however, because the State did not intelligently waive its Section 2244(d) limitations defense. *See infra* at 46-49.

procedural issues should be raised or waived." *Long*, 393 F.3d at 403 (citing *Szuchon v. Lehman*, 273 F.3d 299, 321 n.13 (3d Cir. 2001)).

Federal law vindicates these interests in concrete ways. Habeas Rule 4, for example, requires a district court to *sua sponte* dismiss a habeas petition before ordering the State to respond "[i]f it plainly appears . . . that the petitioner is not entitled to relief." At this screening stage, district courts must dismiss habeas petitions that are, among other reasons, untimely, unexhausted, defaulted, or procedurally barred for another reason. *See Day*, 547 U.S. at 207. "This power is rooted in 'the duty of the court to screen out frivolous petitions and eliminate the burden that would be placed on the respondent by ordering an unnecessary answer.'" *Kiser v. Johnson*, 163 F.3d 326, 328 (5th Cir. 1999) (quoting 28 U.S.C. foll. § 2254 Rule 4 Advisory Committee Notes); *Acosta v. Artuz*, 221 F.3d 117, 123 (2d Cir. 2000) (same).

Second, AEDPA requires district courts and the courts of appeals to review habeas petitions before allowing an appeal. Only habeas applicants with colorable constitutional claims may obtain a COA. *See* 28 U.S.C. § 2253. "The COA process screens out issues unworthy of judicial time and attention and ensures that frivolous claims are not assigned to merits panels." *Gonzalez v. Thaler*, --- S. Ct. ---, 2012 WL 43513, at *7 (Jan. 12, 2012). The court of appeals thus "may deny a COA if there is a plain procedural bar to habeas relief, even though the district court did not rely on that bar." *Davis v. Roberts*, 425 F.3d 830, 834 (10th Cir. 2005). That course of action, while certainly lawful, denies the petitioner the chance to address the issue. The alternative, then, is to follow the path the Tenth Circuit chose here—*i.e.*, add the procedural issue and grant the COA. "Courts of appeals regularly amend COAs . . . to add issues." *Gonzalez*, 2012 WL 43513, at *7 (citing *Saunders v. Senkowski*, 587 F.3d 543, 545 (2d Cir. 2009) (per curiam)).

Habeas Rule 4 and the COA procedure both advance Congress' recognized goal of "streamlining federal habeas proceedings" and "encouraging finality" of state-court convictions. *Rhines v. Weber*, 544 U.S. 269, 277 (2005); *see also United States v. Bendolph*, 409 F.3d 155, 163 n.13 (3d Cir. 2005) ("Congress plainly intended strict reform of habeas corpus in passing the AEDPA, and the practical problems of attempting to re-litigate matters which are many years old are obvious."). Nothing in AEDPA's text or legislative history, or in any of this Court's decisions for that matter, curtails "the otherwise broad power of a circuit court to entertain matters *sua sponte* that a [party] failed to raise on appeal." *Thomas*, 371 F.3d at 795 (Tjoflat, J., specially concurring).

Quite the opposite, forbidding courts of appeals from appropriately exercising their inherent discretion to raise forfeited issues in habeas cases would misdirect scarce judicial resources by allowing meritless appeals to crowd out serious claims for relief. *See Brown v. Allen*, 344 U.S. 443, 537 (1953) (Jackson, J., concurring in the result).[11] Faced with the choice of granting the COA on those terms, or denying the COA on a ground that was forfeited below, many courts of appeals may choose the latter, especially when the procedural issue should have been caught by the district court at the initial screening stage. As it has in the past, this Court should encourage the courts of appeals to exercise their inherent authority to "'prevent frivolous appeals from delaying the States' ability to impose sentences, including death sentences' while at the same time protecting the right of petitioners to be heard." *Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). Rejecting the Tenth Circuit's approach would not only force courts to expend scarce resources on plainly frivolous appeals, but would also undermine a petitioner's interest in being heard on the procedural issue instead of simply having the COA denied.[12]

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[11] As the COA provision illustrates, Congress was concerned with the need to preserve limited judicial resources for habeas petitions with colorable constitutional claims. *See, e.g.*, 141 Cong. Rec. S7803-01 (daily ed. June 7, 1995) (statement of Sen. Nickles) ("[H]abeas procedures are wasteful. The current system is wasteful of limited resources. At a time when both State and Federal courts face staggering criminal caseloads, we can ill afford

B. This authority extends with equal force to Section 2244(d) limitations defenses that were not preserved for appellate review.

Although his brief is unclear, Wood does not appear to contest an appellate court's inherent authority to raise a forfeited issue. Nor does Wood contest the district court's authority under Habeas Rule 4 to *sua sponte* dismiss

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to make large commitments of judicial and prosecutorial resources to procedures of dubious value in furthering the ends of justice.").

[12] Moreover, adopting an inflexible rule that the courts of appeals can never address forfeited issues in habeas cases would disserve petitioners as well, as they too may forfeit issues that merit appellate review. *See, e.g.*, *Thomas*, 371 F.3d at 794 (Tjoflat, J., specially concurring) ("[T]he fact that Thomas did not mention the §§ 2241/2254 issue in his COA petition does not bar us from exercising our discretion to rule *sua sponte* on this critical threshold issue.").

the petition as untimely without a response from the State. And he clearly does not contest a district court's established authority, under *Day*, to *sua sponte* raise the Section 2244(d) limitations defense at a later point in the proceeding so long as the issue was not intelligently waived. *See* Pet'r Br. 32. Wood instead argues that *only* a district court has that authority and the Tenth Circuit thus could not reach the issue on appeal. Pet'r Br. 32-34. Neither *Day* nor any of this Court's other decisions supports Wood's argument.

1. In *Day*, the Court held that a district court had the authority to *sua sponte* raise the Section 2244(d) limitations defense and dismiss the petition as untimely even though the state's answer had expressly conceded the issue. 547 U.S. at 202. Because Section 2244(d) is not jurisdictional, "courts are under no *obligation* to raise the time bar *sua sponte*." *Id.* at 205. Even still, "the limitations defense resembles other threshold barriers—exhaustion of state remedies, procedural default, nonretroactivity—courts have typed 'nonjurisdictional,' although recognizing that those defenses 'implicat[e] values beyond the concerns of the parties.'" *Id.* at 205 (quoting *Acosta*, 221 F.3d at 123). In light of *Granberry*, *Caspari* and *Schiro*, among other decisions, the district court was "permitted, but not obliged, to consider, *sua sponte*, the timeliness of a state prisoner's habeas petition." *Id.* at 209.

Thus, the district court had the authority to raise the Section 2244(d) limitations issue so long as the state had not waived it. "The considerations of comity, finality, and the expeditious handling of habeas proceedings that motivated AEDPA . . . counsel against an excessively rigid or formal approach to the affirmative defenses now listed in Habeas Rule 5." *Id.* at 208 (citing *Granberry*, 481 U.S.

at 131-34). The Court recognized that "it would make scant sense to distinguish in this regard AEDPA's time bar from other threshold constraints on federal habeas petitioners." *Id.* at 209. "'AEDPA's statute of limitations advances the same concerns as those advanced by the doctrines of exhaustion and procedural default, and must be treated the same.'" *Id.* (quoting *Long*, 393 F.3d at 404). However, "should a State intelligently choose to waive a statute of limitations defense, a district court would not be at liberty to disregard that choice," *id.* at 210 n.11, as it would be improper "to override a State's deliberate waiver of a limitations defense," *id.* at 202.

The Court determined that the district court had "confronted no intelligent waiver on the State's part, only an evident miscalculation of the elapsed time under a statute designed to impose a tight time constraint on federal habeas petitioners." *Id.* at 202; *see also id.* at 203 (explaining that the state had miscalculated the deadline by "[o]verlooking controlling Eleventh Circuit precedent"). Accordingly, the district court had the discretion to raise the issue. But "before acting on its own initiative, a court must accord the parties fair notice and an opportunity to present their positions," it must "assure itself that the petitioner is not significantly prejudiced by the delayed focus on the limitation issue," and it must "determine whether the interests of justice would be better served by addressing the merits or by dismissing the petition as time barred." *Id.* at 210 (quoting *Granberry*, 481 U.S. at 136) (other citations and quotations omitted).

The Court affirmed the Eleventh Circuit's decision under this standard. The petitioner had been afforded the opportunity to address the issue, he had not been prejudiced by the delay, and "nothing in the record suggests that the State 'strategically' withheld the defense or chose to relinquish it." *Id.* at 210-11. "From all that appears in the record, there was merely an inadvertent error, a miscalculation that was plain under Circuit precedent, and no abuse of discretion in following this Court's lead in *Granberry* and *Caspari* . . . ." *Id.* at 211.

Day confirms that the Tenth Circuit did not exceed its authority in raising the timeliness issue on its own motion. The Court made clear that the *Granberry* principle applies with equal force to the Section 2244(d) limitations defense. That principle, as explained above, permits the courts of appeals to raise *sua sponte* a threshold AEDPA defense that was forfeited in the district court so long as the State had not intelligently waived it. That is precisely what the Tenth Circuit did here.

2. Wood argues that the reasoning of *Day* is limited to district court proceedings because AEDPA's limitations defense "does not raise the same comity and federalism concerns as exhaustion or procedural default." Pet'r Br. 27 (citation omitted). *Day* pointedly rejected that proposition. The Court found that Section 2244(d)'s limitations defense limitations "is explicitly aligned with those other defenses under the current version of Habeas Rule 5(b)." *Day*, 547 U.S. at 208; *see also id.* at 209 (noting that Habeas Rule 5(b) places '"a statute of limitations' defense on par with 'failure to exhaust state remedies, a procedural bar, [and] non-retroactivity'"). Distinguishing *Granberry* from *Day* on this ground makes "scant sense." *Id.* at 214.

In any event, other decisions similarly confirm that "[t]he 1–year limitation period of § 2244(d)(1) quite plainly serves the well-recognized interest in the finality of state court judgments. This provision reduces the potential for delay on the road to finality by restricting the time that a prospective federal habeas petitioner has in which to seek federal habeas review." *Duncan*, 533 U.S. at 179 (citation omitted); *see also Rhines*, 544 U.S. at 276 (same); *Woodford v. Garceau*, 538 U.S. 202, 206 (2003) (noting that "Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases" (internal quotation marks and citations omitted)); *Williams*, 529 U.S. 362, 386 (2000) (Stevens, J.) ("Congress wished to curb delays, to prevent 'retrials' on federal habeas, and to give effect to state convictions to the extent possible under law."). Moreover, Section 2244(d) not only establishes a "reasonable time" to challenge a final conviction, but "safeguards the accuracy of state court judgments by requiring resolution of constitutional questions while the record is fresh." *Acosta*, 221 F.3d at 123. Like AEDPA's other threshold defenses, rigorous enforcement of AEDPA's limitations period "promotes judicial efficiency and conservation of judicial resources." *Id.* (citing *Schlup v. Delo*, 513 U.S. 298, 322 (1995)).

At base, Section 2244(d) "implicates values beyond the concerns of the parties" in the same way as AEDPA's other threshold defenses. *Id.*; *see also Long*, 393 F.3d at 404 ("AEDPA's statute of limitations advances the same concerns as those advanced by the doctrines of exhaustion and procedural default, and must be treated the same.") (citations omitted). "Like the other procedural bars to habeas review of state court judgments, the statute of limitation implicates the interests of both the federal and state courts, as well as the interests of society, and therefore it is not inappropriate for the court, on its own motion, to invoke the doctrine." *Acosta*, 221 F.3d at 123 (citation and quotation omitted). Any other conclusion is foreclosed by *Granberry* and *Day*.[13]

3. Wood argues that *Kontrick v. Ryan*, 540 U.S. 443 (2004), and *Eberhart v. United States*, 546 U.S. 12 (2005) (per curium), indicate otherwise. Pet'r Br. 23-25. That too is incorrect: both are routine forfeiture cases. In *Kontrick*, the Court held that "a debtor *forfeits* the right to rely on" a particular time-bar in the Bankruptcy Rules if he "does not raise the Rule's time limitation before the bankruptcy court reaches the merits of the creditor's objection to discharge." 540 U.S. at 447 (emphasis added). In *Eberhart*, the Court similarly held that although the defendant had untimely moved for a new trial under Federal Rule of Criminal Procedure 33, because "the Government failed to raise a defense of untimeliness until after the District Court had reached the merits, it *forfeited* that defense." 546 U.S. at 19 (emphasis added).

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[13] Wood also incorrectly argues that Section 2254(b)(3) undermines the State's argument. Pet'r Br. 22. The Court was aware of this provision in *Day*, but did not consider it a basis for distinguishing exhaustion from timeliness. *See Day*, 547 U.S. at 206 & n.4. In fact, that provision appears to have been inserted to address confusion about the exhaustion defense that persisted after *Granberry*. *See Clayton v. Gibson*, 199 F.3d 1162, 1170 (10th Cir. 1999); *Brown v. Maass*, 11 F.3d 914 (9th Cir. 1993). Congress's failure to enact a similar provision regarding the limitations period reflects only the fact that there was no ongoing dispute regarding the limitations period; indeed, there had been no limitations period until AEDPA. But once division surfaced in the lower courts, *see Day*, 547 U.S. at 205, the Court resolved it by holding that the limitations defense should be treated the same as the exhaustion defense, *see supra* at 30-32.

Wood correctly observes, therefore, that the statute-of-limitations defenses at issue in *Kontrick* and *Eberhart* were "subject to forfeiture." Pet'r Br. 24. But that does not aid his cause. In neither case did forfeiture deprive the court of appeals of the authority to raise the limitations issue on its own motion. As in *Granberry* and *Day*, it required the court to evaluate whether the particular statute "implicates judicial interests beyond those of the parties" such that "it may be appropriate for a court to invoke the rule *sua sponte* in order to protect those interests." *United States v. Mitchell*, 518 F.3d 740, 750 (10th Cir. 2008).[14] While "[t]he presumption . . . is to hold the parties responsible for raising their own defenses," the court of appeals may raise the defense *sua sponte*, especially when it "implicates the court's power to protect its own important institutional interests. This principle was at work in *Day* where the court looked to the important values the habeas scheme was designed to protect and determined they went beyond the interests of the parties." *Id.* at 749.

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[14] Wood's reliance on *Grigsby v. Cotton*, 456 F.3d 727 (7th Cir. 2006), is misplaced. Pet'r Br. 29-31. There, the state forfeited the Section 2244(d) limitations defense by failing to raise it in the district court. *See Grigsby*, 456 F.3d at 731. Contrary to Wood's suggestion, however, the Seventh Circuit did not conclude that it was powerless to address the forfeited issue on appeal. It merely declined to do so because it would have been "inappropriate" under the circumstances of that case. *Id.* As *Grigsby* shows, forfeiture and waiver will result in the same outcome where the appellate court finds it inappropriate to reach the unpreserved issue. As *Granberry*, *Caspari*, and the decision below all illustrate, however, that is not always true.

4. Last, Wood argues that the decision below is inconsistent with traditional habeas practice, Pet'r Br. 21-22, as well as the Federal Rules of Civil Procedure and Habeas Rules, *id.* 25-26. But that argument was likewise rejected in *Day*. The dissent contended that application of the generic civil rules to Section 2244(d)'s limitations provision should bar courts from addressing the issue if it is not preserved in the answer. *See Day*, 547 U.S. at 213 (Scalia, J., dissenting). The majority disagreed and the issue is now settled. *See CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630, 2636 (2011) ("'Considerations of *stare decisis* have special force in the area of statutory interpretation . . . .'" (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989)). If anything, the dissent confirms that *Day*'s extension of "the *Granberry* regime" to Section 2244(d) "allows the forfeited procedural defense to be raised for the first time on appeal, either by the State or by the appellate court *sua sponte*." *Day*, 547 U.S. at 217 (Scalia, J., dissenting).

Even if *Day* had not decisively rejected Wood's argument, there are other reasons for allowing the court of appeals to raise the Section 2244(d) limitations issue under circumstances where it might be inappropriate in an ordinary civil case. As explained above, Section 2244(d) implicates finality and conservation of judicial resources in ways that the affirmative defenses generally governed by Rule 8(c) of the Federal Rules simply do not. *See supra* at 32-33. From a substantive perspective, the defense more closely resembles claim or issue preclusion, which the court of appeals similarly may raise *sua sponte* notwithstanding Wood's narrow interpretation of the Federal Rules. *See Taylor v. Sturgell*, 553 U.S. 880, 907 (2008) ("Claim preclusion, like issue preclusion, is an affirmative defense." (citing Fed. Rule Civ. P. 8(c)) (other citations omitted)). If the Federal Rules do not prevent the court of appeals from raising claim or issue preclusion *sua sponte*, the result should be no different here: both rules implicate concerns beyond those peculiar to the parties before the court.

Section 2244(d)'s limitations defense also is subject to vastly different procedural constraints than the run-of-the-mine affirmative defense. As an initial matter, the COA process has no analogue in ordinary civil litigation. But the differences between habeas and ordinary civil litigation appear far before an appeal is noticed. Under the Federal Rules, a defendant ordinarily may assert an affirmative defense in its answer or it may instead remain silent on the issue. That is not the case in federal habeas litigation. As noted above, Habeas Rule 4 requires the district courts to weed out federal habeas petitions that can be dismissed without a response from the State. In the District of Colorado, however, the court rarely dismisses habeas petitions on its own motion. *See Kilgore*, 519 F.3d at 1089. Instead, as it did here, the district court requires the State to submit a pre-answer response. In that response, the State must address timeliness and exhaustion and must notify the court if it intends to assert either defense. And if the district court orders the State to file an answer, Habeas Rule 5 instructs it to "state whether any claim in the petition is barred by a failure to exhaust state remedies, a procedural bar, non-retroactivity, or a statute of limitations." Indeed, the Committee most recently charged with revising the habeas rules declined to label the defenses in Rule 5 as "affirmative defenses" because it "believed that the term was a misnomer in the context of habeas petitions." Report of the Advisory Committee on Criminal Rules, GAP Report—Rules Governing § 2254 Proceedings (May 15, 2003).

Habeas Rules 4 and 5 (especially as implemented in Colorado) thus are geared less at imposing a purely adversarial system as at assisting the district court in fulfilling its obligation to weed out faulty habeas petitions. This is remarkably different from the adversarial system of civil litigation on which the Federal Rules are premised. The defenses set forth in Habeas Rule 5 are simply nothing like the "affirmative defenses" that are deemed waived under Federal Rule 8(c) if they are not asserted in the answer. *See Mitchell*, 518 F.3d at 750 ("At the core of the Court's opinion in *Day* is the notion that habeas proceedings are different from ordinary civil litigation and, as a result, our usual presumptions about the adversarial process may be set aside."). It is the Habeas Rules—not the Federal Rules, which apply to "proceedings for . . . . habeas corpus" only "to the extent that the practice in such proceedings is not set forth in statutes of the United States" or "the Rules Governing Section 2254 cases," Fed. R. Civ. P. 81(a)(4)—that drive the outcome of this case.

The key role the Habeas Rules and the pre-answer response played in this case reveal the marked difference between habeas litigation and traditional civil litigation. Wood's habeas petition was untimely on its face as the one-year limitations period had expired seven years before he filed his 2004 state postconviction motion and more than a decade before he filed in federal court. If this were traditional litigation, the State simply could have filed a motion to dismiss based on the allegations in Wood's complaint and it would have prevailed.

But Habeas Rule 4 tasks the district court with the responsibility to screen untimely petitions in order to relieve the State of the burden of responding to the flood of frivolous habeas petitions that are filed in federal court each year. At first, the district court performed its function and dismissed Wood's petition as untimely. After Wood sought reconsideration, however, the court reversed itself without explanation and ordered the State to file a pre-answer response. Importantly, the court specifically ordered the State to address timeliness, instructed it to attach any documents relevant to the issue, and forbade the State from a filing a motion to dismiss. Having been drafted into service by the district court, the State faithfully identified Wood's 1995 postconviction motion and mistakenly offered the "cryptic" response that Wood now claims should be deemed a waiver of the limitations issue. Whether or not this is a prudent system of screening habeas petitions, it clearly is nothing like ordinary, adversarial civil litigation.

Moreover, requiring the State to take a position on timeliness early in the litigation is often particularly demanding as "the practical reality of habeas is that the government may lack, for long periods of time, the file documents necessary to knowledgeably analyze timeliness," and "[e]ven when the record papers are obtained, it can be difficult to decipher what a *pro se* habeas movant has done, meaning many 'waivers' will not actually have been the result of a purposeful or deliberate decision to forego the defense." *Bendolph*, 409 F.3d at 167 (internal quotation marks omitted); *see also Pliler v. Ford*, 542 U.S. 225, 232 (2004) ("[D]istrict judges often will not be able to make [AEDPA limitations] calculations based solely on the face of habeas petitions" and thus "[s]uch calculations depend upon information contained in documents that do not necessarily accompany the petitions."). Accordingly, "as a matter of elapsed time, the first practicable chance to knowledgeably raise a timeliness issue often arises later in the life of a habeas case than it would in an ordinary civil one." *Bendolph*, 409 F.3d at 168 n.19.[15]

In sum, the "practical reality" of habeas litigation confirms both the logic of *Granberry* and *Day* and the fallacy of treating Section 2244(d) as an typical affirmative defense. At least in Colorado, instead of responding to the petitioner's allegations in the ordinary course, the State is required by rule and practice to neutrally examine the petition's timeliness, often before it has sufficient information to make an informed judgment, in order to assist the court in performing the function assigned to it by Habeas Rule 4. An incomplete or inaccurate response thus cannot be considered an intelligent waiver absent strong evidence that the State was intentionally and knowingly relinquishing the issue. The requirement that the State "intelligently choose to waive a statute of limitations defense" before appellate review is foreclosed is the only appropriate standard given the uniqueness of this process. *Day*, 547 U.S. at 202 n.11.

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[15] Although the State had the relevant documents in this case, the facts here likewise show the impossibility of imposing traditional civil litigation standards on federal habeas defendants. As noted above, Wood never mentioned the now-pivotal 1995 state postconviction motion; it was the State that discovered it and raised the issue with the district court in its pre-answer response in accordance with its duties under the Habeas Rules.

II. The State Did Not Intelligently Waive The Section 2244(d) Limitations Defense.

Wood incorrectly contends that the State waived the Section 2244(d) limitations defense by stating that it "will not challenge, but [is] not conceding, the timeliness of Wood's habeas petition." Pet'r Br. 34. This statement falls far short of the Court's standard for waiver, which is the intentional relinquishment of a known right. The State stressed that it was "not conceding" the issue. To be sure, the assertion that the State neither "challeng[ed]" nor "conced[ed]" the timeliness of Wood's petition renders the statement somewhat ambiguous. But the ambiguity only underscores the importance of maintaining the clear distinction between waiver and forfeiture. The State's inartful statement was the product of the unique obligation thrust on the State to file a pre-answer response on this issue, Wood's repeated failure to identify his 1995 state postconviction motion, and, as in *Day*, the State's confusion as to the state of the law. Together, these circumstances confirm that the State did not intentionally and knowingly relinquish its Section 2244(d) limitations defense.

A. A State does not intelligently waive the Section 2244(d) limitations defense unless it intentionally and knowingly relinquishes the issue.

The Section 2244(d) limitations defense is waived only if it is intelligently relinquished. Under this Court's decisions, the waiver is intelligent if it is intentional and knowing. An equivocal statement, therefore, falls far short of the standard for waiver. Rather, when the State fails to preserve the issue because of mistake or inadvertence, it has been forfeited. The Court has made clear that it would be inappropriate to reach an issue that has been forfeited for tactical reasons. But whether the State has engaged in sandbagging bears on whether the court of appeals may resurrect a forfeited issue, not whether the issue was intelligently waived.

1. To foreclose further review of the issue, the State must "*intelligently* choose to waive a statute of limitations defense." *Day*, 547 U.S. at 211 n.11 (emphasis added). A waiver is intelligent if it is the "*intentional* relinquishment or abandonment of a *known* right." *Johnson*, 304 U.S. at 464 (emphasis added). In other words, the waiver must be made with "full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine*, 475 U.S. 412, 421 (1986); *see also Edwards v. Arizona*, 451 U.S. 477, 482-83 (1981); *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). This is the uniform standard for determining whether there has been an intelligent waiver. *See Kontrick*, 540 U.S. at 458 n.13 (time limitations under the Bankruptcy Rules); *see, e.g.*, *Brickwood Contractors, Inc. v. Datanet Eng'g, Inc.*, 369 F.3d 385, 395 n.7 (4th Cir. 2004) (Rule 11 of the Federal Rule's "safe harbor"); *Zuckerman Spaeder, LLP v. Auffenberg*, 646 F.3d 919, 922 (D.C. Cir. 2011) (Federal Arbitration Act); *Chestnut*, 305 F.3d at 20 (immunity from punitive damages under 42 U.S.C. § 1983).

In light of its consequences, waiver should not be inferred lightly. The standard for evaluating whether a statement amounts to an intelligent waiver has arisen in all manner of cases, but this Court has been steadfast that an equivocal statement does not constitute an intelligent waiver. *See Johnson*, 304 U.S. at 464 (finding that "courts indulge every reasonable presumption against waiver"); *Coll. Sav. Bank v. Fl. Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 680-82 (1999) (holding that the waiver must be "unequivocal" for it to be "voluntary" and "intentional"); *see also* Federal Practice & Procedure § 4405 ("An ambiguous statement of position . . . may not be treated as a waiver."); *see, e.g.*, *Lurie v. Wittner*, 228 F.3d 113, 123 (2d Cir. 2000) (holding that "[w]hatever counsel was saying," the state attorney's "cryptic" discussion of applicant's claim was not an "express" waiver of exhaustion); *Deutsch v. Flannery*, 823 F.2d 1361, 1365 n.2 (9th Cir. 1987) (holding that the statement that defendants would "not oppose Deutsch's right to file a new complaint arising out of matters involved in the case" while also reserving the "right to file any and all motions addressed to [such] a . . . complaint" did not amount to waiver of issue preclusion).[16]

To conclude otherwise, the Court would need to abandon this framework or create a special rule for habeas cases under which something short of an unequivocal statement will constitute an intelligent waiver. There is no reason to contort established law here. An equivocal statement can never demonstrate that the State has intentionally and knowingly waived one of AEDPA's threshold defenses given the concerns implicated by federal review of state-court convictions.

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[16] With respect to waiver of Eleventh Amendment immunity, the Court has rejected the concept of a constructive or implied waiver. *See Coll. Sav. Bank*, 527 U.S. at 681-83. "The interests of federalism require that such a waiver be clear and unequivocal." *Burke v. Beene*, 948 F.2d 489, 493 (8th Cir. 1991) (citing *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 306-07 (1991). Those same federalism concerns are present whenever a State is haled into federal court to defend the constitutionality of a criminal conviction. As such, a rule against constructive waiver makes sense in this context as well. The Court need not create such a rule in this litigation, however, because whether the State intelligently waived the Section 2244(d) limitations defense turns on the meaning attributed to its statements in the pre-answer response and answer—not implications that might be drawn from its conduct.

2. Forfeiture, on the other hand, is best defined by what it is not: neither waiver nor preservation of an issue. In other words, forfeiture occurs when a party fails to preserve an issue yet does not intelligently waive it. *See Kontrick*, 540 U.S. at 458 n.13. *Puckett* illustrates the point. There, the defendant's counsel failed to object at sentencing to the government's breach of a plea agreement. 129 S. Ct. at 1427. The Court rejected Puckett's argument that he could avoid plain-error review because the government's broken promise vitiated the "knowing and voluntary character" of the plea agreement. *Id.* "Puckett's argument confuse[d] the concepts of waiver and forfeiture. Nobody contend[ed] that Puckett's counsel has *waived* —that is, intentionally relinquished or abandoned—Puckett's right to seek relief from the Government's breach." *Id.* at 1430-31. "Puckett *forfeited* the claim of error through his counsel's failure to raise the argument in the District Court." *Id.* at 1431.

Under the Court's jurisprudence, forfeiture is commonly marked by mistake, inadvertence, or confusion. *See, e.g.*, *Granberry*, 481 U.S. at 132 & n.5 (referring to "inadvertence" and "mistake"). This makes sense given waiver must be intentional and knowing. In *Day*, for example, the State expressly conceded that the habeas petition had been timely filed. 547 U.S. at 201. But the

Court concluded that the State's concession was premised upon "an evident miscalculation of the elapsed time" that the Court suggested was both a mistake of fact, *id.* at 202, and a mistake of law, *see id.* at 203 (noting that the State "[o]verlook[ed] controlling Eleventh Circuit precedent"). Because there was "no intelligent waiver on the State's part," *id.* at 202, the Court treated the erroneous concession as forfeiture, thereby preserving judicial "discretion to correct the State's error and, accordingly, to dismiss the petition as untimely under AEDPA's one-year limitation," *id.*

3. The reasons behind a party's forfeiture of an issue are relevant to an appellate court's decision whether to exercise its discretion to address a forfeited issue—but they cannot convert forfeiture into a waiver. As *Granberry* explained, it would be "unwise to adopt a rule that would permit, and might even encourage, the State to seek a favorable ruling on the merits in district court while holding [a procedural] defense in reserve for use on appeal if necessary." 481 U.S. at 132. *Day* similarly focused on whether the "State 'strategically' withheld the defense." 547 U.S. at 211. That important concern thus bears on "whether the administration of justice would be better served" by considering the forfeited issue "or by reaching the merits of the petition forthwith." *Granberry*, 481 U.S. at 131. In other words, a State's gamesmanship in failing to timely preserve a defense is but one of many possible "circumstances which the courts of appeals . . . are able to evaluate individually" when exercising their discretion to consider a forfeited threshold defense to a federal habeas petition. *Id.* at 136.

B. The facts of this case show that the State did not intelligently waive the Section 2244(d) limitations defense.

There is no basis for concluding that the State intelligently waived the Section 2244(d) limitations defense. The statement in the pre-answer response and answer was neither an intentional nor knowing relinquishment of the issue. The State's equivocal response may have forfeited the Section 2244(d) issue—but it clearly did not waive it.

1. The State did not intentionally waive the Section 2244(d) limitations defense. In its pre-answer response and its answer, the State stressed that it was "not conceding[] the timeliness of Wood's habeas petition," JA 70a, and "[did] not concede[] the timeliness of the petition," JA 87a. Faced with an unusual scenario—largely of Wood's own making—the State, for better or worse, notified the district court of the 1995 state postconviction motion, questioned whether it rendered Wood's case timely, and ultimately informed the court that "Respondents will not challenge, but are not conceding, the timeliness of Wood's habeas petition in the pre-answer response." JA 70a; *see also* JA 87a. The State's prominent refusal to concede timeliness—even if it was preceded by "cryptic" analysis—necessarily precludes an intentional waiver.

One thing is certain: contrary to Wood's assertion, Pet'r Br. 37-38, the State was not intentionally relinquishing the issue. By refusing to "concede" timeliness, the State did not "grant as a right" or "accept as true" the timeliness of Wood's petition. Webster's Ninth New Collegiate Dictionary 271. Try as he might, Wood cannot ignore the State's express desire to "not conced[e] the timeliness of Wood's habeas petition." JA 70a; JA 87a. The State's response was not a concession of the timeliness of Wood's habeas petition. At most, the State's position on the timeliness question was ambiguous. But an ambiguous statement is not a waiver. Indeed, even Wood acknowledges that waiver requires a "clear manifestation of an intentional relinquishment of a known right." Pet'r Br. 35. No such clear intent is even remotely present here. The State did not affirmatively consent to the timeliness of Wood's petition.

2. Even if this statement could be viewed as intentional, which it cannot, it was not made *knowingly*. As *Day* makes clear, failing to preserve the timeliness issue is not *knowing* if the State labored under a mistake of law or fact. That is precisely what occurred here. The State's pre-answer response reveals that it was based on a misunderstanding of how AEDPA's limitations period interacts with state-court procedural rules in the context of possible abandonment. After raising the timeliness issue, the sole reason for not pursuing it vigorously was the mistaken belief that Wood's 1995 motion needed to be abandoned "before 1997" for the federal habeas petition to be untimely. JA 70a. As the Tenth Circuit explained, however, this is not the law: "any break in the pendency of the 1995 motion after AEDPA's enactment renders Wood's 2008 federal habeas petition untimely." JA 143a. In other words, if the 1995 motion had been abandoned at any time before the filing of his 2004 state postconviction motion, Wood's federal petition was untimely. That was not debatable.[17] The State's failure to properly argue the

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[17] Of course, if Wood were correct that the 1995 state conviction motion remained pending until he filed his federal

issue thus was based on a mistake. As in *Day*, because the State's labored under a misunderstanding of the law, it did not knowingly waive the Section 2244(d) limitations defense.

Wood argues that because "the state was aware of a possible argument that the petition was untimely and . . . elected not to raise a timeliness defense," it intentionally waived the issue. Pet'r Br. 35; *see also id.* 37-38. But if awareness of an issue amounted to a knowing waiver, *Day* would have turned out differently; the State was clearly aware of the potential defense in that case. *See* 547 U.S. at 201-02. Indeed, the State had expressly addressed and conceded the issue in its answer. *Id.* Yet this Court concluded that the State's failure to preserve the issue was not knowing. Given that the State did not even concede timeliness here, there is no basis for holding it to a higher standard than the respondent in *Day*. Under *Day*, the State's awareness of a Section 2244(d) limitations issue cannot be decisive in determining whether it has been knowingly waived.[18]

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habeas petition in 2008, then the claims set forth in it are unexhausted and his petition is thus procedurally barred.

[18] Moreover, Wood's focus on a party's awareness would blur the clear distinction between intelligent waiver and forfeiture by forcing federal courts to surmise from a party's pleadings whether it was aware of a potential argument it failed to preserve. This Court has rejected such an amorphous approach. *See, e.g., Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 142-45 (1967) (declining to find waiver by presuming that "the general state of the law . . . was such that [the plaintiff] should . . . have seen 'the handwriting on the wall'").

3. Because the State did not intelligently waive the Section 2244(d) limitations defense, its failure to preserve the issue must be treated as forfeiture. The facts here bear the mark of mistake and inadvertence that commonly lead to the forfeiture of an issue as opposed to indicating that the State intentionally and knowingly relinquished it. In the aftermath of the district court's decision to implement the pre-answer process, it instructed the State to address the petition's timeliness at the outset of this litigation. The State's misunderstanding of the legal framework led it to believe that the limitations question was a far closer call than it actually was and to submit an equivocal response. Wood's failure to alert the district court to the existence of the 1995 state postconviction motion only compounded the problem. These are exactly the kind of circumstances that lead a State to forfeit a threshold defense that, in hindsight, it should have pressed from the beginning.

III. The Court Of Appeals Appropriately Exercised Its Discretion To Resolve The Limitations Defense And Dismiss Wood's Petition As Untimely.

Whether the court of appeals appropriately resolved the forfeited limitations issue is not within the scope of either question presented. Wood's attempt to second-guess that aspect of the decision below thus is not before this Court. In any event, his arguments are entirely misplaced. The Tenth Circuit followed this Court's instructions in *Day* and reasonably concluded that it was appropriate to resolve the issue under the facts of this case.

1. As an initial matter, the State's handling of the timeliness issue was not a tactical ploy. Far from it. The confusion surrounding this issue was the product

of Wood's failure to indicate the existence of the 1995 state-court motion, the State's erroneous understanding of the interaction of AEDPA's tolling and limitations periods, and the complexity of the procedural posture. Contrary to Wood's suggestion, Pet'r Br. 38-42, the State did not "strategically" withhold the limitations issue from the district court, *Day*, 547 U.S. at 200, or refrain from raising it as a matter of "tactics," *Granberry*, 481 U.S. at 132. It was the State (in its pre-answer response) that first alerted the district court to the motion's existence and its potential impact on the petition's timeliness. And it was the Tenth Circuit—not the State—that raised the issue on appeal. There is simply no basis to suggest that the State was sandbagging in an attempt to prevail on the merits instead, especially when the State sought to have the petition dismissed on other procedural grounds. It would have been a curious strategy indeed to raise the issue in the district court, but not preserve it, in the hope that the Court of Appeals would resurrect the issue on its behalf. The State's handling of the limitations issue was far from perfect—but it was anything but strategic.

2. Nor can Wood complain that he was denied notice and an opportunity to present his arguments on the timeliness issue. *See Day*, 547 U.S. at 210. Before the court of appeals dismissed his petition as untimely, Wood had filed no fewer than five briefs addressing whether his petition was timely under Section 2244(d).[19] Nor did new information come to light in later proceedings, as Wood

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[19] Wood addressed the issue of timeliness in: (1) a response to the show cause order; (2) a motion for reconsideration; (3) a response to the State's pre-answer response; (4) a Tenth Circuit opening brief; and (5) a Tenth Circuit reply brief.

was always aware of his 1995 state-court motion. After all this briefing, notice, and an opportunity to be heard, "[t]he considerations of comity, finality, and the expeditious handling of habeas proceedings that motivated AEDPA," *Day*, 547 U.S. at 208, counseled in favor of dismissal on this ground.

3. Wood also suffered no measurable prejudice from the Tenth Circuit's decision to address the question. Wood hypothesizes that a contrary response from the State in its pre-answer response or answer might have led to an evidentiary hearing or convinced the district court to appoint him counsel, which in turn may have led to a stay and abeyance of his petition so he could somehow exhaust the 1995 motion. Pet'r Br. 38-42. But such speculation ignores the facts of this case. As the court of appeal's decision shows, no evidentiary hearing was needed to resolve this issue. Moreover, the Tenth Circuit appointed appellate counsel to assist Wood in addressing this issue—and yet on appeal he still failed to make the argument he asks the Court to adopt until the panel rehearing stage. No counterfactual scenario could have solved Wood's timeliness problem. And even if it could, the claims he wishes to pursue would still be unexhausted and procedurally barred.

4. The Tenth Circuit carefully exercised its discretion to address the timeliness issue despite the State's mistaken handling of it. As it was required to do, the court of appeals considered whether it would be appropriate to decide the issue notwithstanding the State's forfeiture. It understood the obligation to "assure . . . that the petitioner is not significantly prejudiced by the delayed focus on the limitation issue, and determine whether the interests of

justice would be better served by addressing the merits or by dismissing the petition as time barred." JA 140a (quoting *Day*, 547 U.S. at 210). The court wisely concluded that "consideration of the timeliness issue is particularly apt in this case, given that the issue was raised in the district court and addressed by Wood, the parties have briefed the issue on appeal, and the interests of justice would be served in reaching the timeliness issue given the extensive time period involved." *Id.* That is a perfectly reasonable exercise of the discretion afforded to the Tenth Circuit under AEDPA, the Habeas Rules, and this Court's decisions.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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January 23, 2012

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REPLY
BRIEF

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A
BRIEFS

No. 10-9995

IN THE

Supreme Court of the United States

PATRICK WOOD,

Petitioner,

v.

KEVIN MILYARD, WARDEN, STERLING CORRECTIONAL FACILITY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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5 Wright & Miller, *Federal Practice and Procedure* (3d ed.) 3, 12

INTRODUCTION

The state agrees that, at a minimum, it forfeited any right it had to raise a 28 U.S.C. § 2244(d) statute of limitations defense on appeal by not asserting the defense in the district court. Resp. Br. 3,13-14. The state also agrees that, pursuant to *Day v. McDonough*, 547 U.S. 198 (2006), the court of appeals would have abused its discretion by *sua sponte* raising the forfeited limitations defense if the state had not just forfeited but had deliberately waived its right to assert the timeliness defense.

The primary points of disagreement between the parties concern:

(1) whether the state deliberately waived any § 2244(d) limitations defense when it twice informed the district court that it "will not challenge, but [is] not conceding," the timeliness of the petition; and

(2) whether an appellate court has authority to *sua sponte* raise the §2244(d) statute of limitations defense when, as here, it has been, at a minimum, forfeited by the state.

Mr. Wood will address each of these disputed points in turn in the argument section below.

SUMMARY OF REPLY ARGUMENT

1. Respondents did "deliberately waive" the statute of limitations defense in the district court, because they identified the defense, identified the argument they could

make in support of that defense, and then advised the court that they were not raising that defense. Nothing more is required for waiver. Accordingly, pursuant to *Day v. McDonough*, 547 U.S. 198 (2006), the court of appeals reversibly erred when it disregarded the respondents' waiver of the limitations defense.

2. Appellate courts may have discretionary authority to *sua sponte* raise a § 2244(d) limitations defense in certain circumstances. However, the *sua sponte* authority of appellate courts does not extend to cases in which the state has purposefully forfeited the limitations defense in the district court. Appellate courts should not be allowed to override a forfeiture where, as here, the state purposefully gave up the defense, the state gained a strategic advantage in the district court by doing so, and the habeas petitioner is prejudiced by the appellate court's *sua sponte* resurrection of the issue.

ARGUMENT

1. The State Deliberately Waived Any Statute of Limitations Defense It May Have Had When It Twice Told the District Court That It "Will Not Challenge, but [is] Not Conceding the Timeliness of Wood's Petition."

The state claims that it forfeited, but did not waive, the statute of limitations defense.[1] Resp. Br. 3. According to the state, when it twice told the district court that it was not challenging timeliness, it was not waiving the defense, because (1) it did not go so far as to concede that Wood's petition was timely, (2) its declarations in the district court were equivocal or cryptic, and (3) it "labored under a misunderstanding of law." Resp. Br. at 47. The state's position both misperceives what is required to waive a § 2244(d) defense and lacks record support.

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[1] Both sides have cited the definitions for forfeiture and waiver provided in *Olano*: "forfeiture is the failure to make the timely assertion of a right," and "waiver is the 'intentional relinquishment or abandonment of a known right.'" *United States*

a. The state intentionally relinquished a known right.

The state's decision not to challenge the timeliness of Wood's petition qualifies as a deliberate waiver of the § 2244(d) defense. In fact, the state acknowledges several

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v. Olano, 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). Pet. Br. 17, n.6.; Resp. Br. 19. To the extent the state asserts that forfeiture and waiver are mutually exclusive, Resp. Br. 44, it errs. *See, e.g., Freytag v. C.I.R.*, 501 U.S. 868, 894 n.2 (1991) (Scalia, J., concurring) (waiver is one means by which forfeiture may occur).

In addition, "[w]hat suffices for waiver depends on the nature of the right at issue." *New York v. Hill*, 528 U.S. 110, 114 (2000). In other contexts involving a lawyer's acquiescence in a particular course of litigation, the Court has found waiver. *See, e.g., id.* at 115 (defendant's right to be tried within period required under the Interstate Agreement on Detainers (IAD) waived by counsel's agreement to trial date beyond that statutory period); *Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381, 394-95 (1998) (Kennedy, J., concurring) (suggesting that state's consent to removal of case to federal court may serve as waiver of Eleventh Amendment immunity claim); *see also* Wright & Miller, 5 *Fed. Prac. & Proc. Civ.* § 1278 (equating failure to assert affirmative defense with waiver).

facts that reveal its deliberate relinquishment of a known statute of limitations defense.

First, the state acknowledges Wood's habeas petition revealed an untimeliness issue "on its face." Resp. Br. 38. Second, the state acknowledges it had all of the documents needed to reveal the timing of all relevant proceedings in the case, including the postconviction motion Wood filed in 1995 and pursued with a "motion to request a ruling." Resp. Br. 5 n.3, 40 n.15.

In addition, as the state acknowledges, the district court carefully laid out the existence of the exact arguable time bar on which the state now relies. Resp. Br. 78, citing App. 45a. The district court not only directed the state's attention to the issue of timeliness, it twice asked the state clearly and specifically to inform the court whether it intended to raise an untimeliness defense. App. 64-65a, Resp. Br. 8-9; App. 81-83a, Resp. Br. 9-10. Twice, the state complied with the court's orders, stating in its pre-answer response that "Respondents will not," and in its answer that "Respondents are not" challenging the timeliness of Wood's petition. App. 70a, Resp. Br. 9-10; App. 87a, Resp. Br. 10.

In marked contrast to the respondent's obvious mathematical error in *Day,* here the state clearly explained exactly why it was relinquishing the limitations defense. App. 70a. The state did not overlook or miss the defense; it chose not to raise it because of the unsettled nature of state law regarding arguable "abandonment" of a properly filed state postconviction motion. In its pre-answer response, the state told the district court that (1) there was a factual question about whether and, if so, when Wood abandoned his 1995 postconviction motion, a motion the state courts to this day have never ruled upon, App. 133-34a, (2) the motion, if not abandoned, would toll the statute of limitations, and (3) this was a question the state did not want to litigate in Wood's case. App. 70a, 87a. In short, the state twice informed the district court that it knew it had an arguable limitations defense, but was relinquishing that defense in favor of seeking to resolve the petition on other grounds.

Notwithstanding its clear decision not to assert the defense in the district court, the state insists that its "prominent refusal to *concede* timeliness–even if it was preceded by 'cryptic' analysis–necessarily precludes intentional waiver." Resp. Br. 46 (emphasis added). The state is wrong. In fact, the state's consistent refusal to concede timeliness in its responsive pleadings does the opposite. It confirms that the state was aware of a potentially meritorious defense but chose not to assert it. By refusing to concede timeliness (*i.e.*, refusing to concede that Wood did not abandon his properly filed 1995 postconviction motion), the state took a position that assured its ability to litigate the issue in a future case, one that would perhaps be, from the state's perspective, a better vehicle for resolution of a difficult issue.[2]

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[2] The state law governing the possible abandonment of postconviction motions is not settled. *People v. Valdez* is the first Colorado case to hold that a postconviction motion *might* be abandoned if it had been pending for many years without ruling. *Id.*, 178 P.3d 1269 (Colo. App. 2007). It was decided shortly before Wood's petition was filed. And, in contrast to panel decisions in federal courts, state appellate court's decision in *Valdez* is not binding on other panels of the Colorado Court of Appeals. *See, e.g., People v. Pennese*, 830 P.2d 1085, 1087 (Colo. App. 1991).

Contrary to the state's argument, deliberate waiver of an issue does not require a concession that one would lose on the merits of the issue were it asserted. Rather, it is simply the intentional relinquishment or abandonment of a known right, that right being, in this instance, the right to raise a limitations defense. Here, the state identified an argument that could be made that the 1995 state postconviction motion was abandoned and, thus, did not toll the one-year limitations period. App. 70a. Having thus acknowledged the argument, the state deliberately chose not to assert it. Nothing more is required to waive a limitations defense or, as phrased in *Day*, to "'strategically' withh[o]ld the defense or cho[o]se to relinquish it." *Id.* at 211.

There is nothing inconsistent, "ambiguous," "equivocal" or "cryptic" about the state's representations in the district court. To the contrary, the state, in response to the district court's direct inquiries, as well as Habeas Rule 5's requirement that any statute of limitations defense be raised in an answer, told the court that, while it was not conceding timeliness, it was not challenging it.

A deliberate waiver of a § 2244(d) affirmative defense does not require any magic words, nor an express statement that the respondents have "voluntarily and intelligently waived" the defense. Here, the respondents repeatedly stated they "were not challenging" the timeliness of the petition, notwithstanding their express recognition that an argument supporting the affirmative defense could be made. Under the circumstances presented by this case, the state must be deemed to have deliberately waived the defense. Such waiver cannot, as a matter of law, be disregarded by a reviewing court. *See Day*, 547 U.S. at 210, n.11.

b. The state acted strategically when it chose not to challenge the timeliness of Wood's petition, removing any doubt as to whether its actions constituted a deliberate waiver.[3]

Before raising a defense *sua sponte*, a court must evaluate whether anything "in the record suggests that the state 'strategically' withheld the defense or chose to relinquish it." *Day*, 547 U.S. at 211. If so, the court "would not be at liberty to disregard that choice." *Id.* at 210 n.11.

The record does not support the state's conclusory assertion that its decision not to challenge timeliness was merely a blunder, not a strategy. Resp. Br. 49-50. In his opening brief, Mr. Wood explained how the state's decision was not only strategic in that it allowed the state to defer resolution of a tricky legal issue until a later case, it conferred other strategic advantages, and concomitant prejudice to Mr. Wood, as well. *See* Pet. Br. 38-42.[4]

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[3] The state argues that whether it chose to forgo the limitations defense for strategic reasons is not within the scope of the questions presented, a position apparently premised on the notion that strategic motivation is not relevant to waiver. Resp. Br. 45, 49-50 ("The reasons behind a party's forfeiture of an issue are relevant to an appellate court's decision whether to exercise its discretion to address a forfeited issue--but they cannot convert forfeiture into a waiver"). This is incorrect. As *Day* itself contemplates, to strategically withhold the assertion of a right is to make a deliberate choice not to raise it, which by definition amounts to an intentional relinquishment of the right. *See Day*, 547 U.S. at 211; *see generally United States v. Jaimes-Jaimes*, 406 F.3d 845, 848 (7th Cir. 2005) (collecting cases).

[4] For example, the State's decision not to challenge timeliness by raising the factual issue of whether Mr. Wood had abandoned his 1995 motion so that it no longer tolled the one-year

Rather than address or attempt to refute petitioner's argument that its decision to forgo the defense was strategic, the state first posits a ludicrous state strategy and then notes, "[i]t would have been a curious strategy indeed to raise the issue in the district court, but not preserve it, in the hope that the Court of Appeals would resurrect the issue on its behalf." Resp. Br. 50; *see also* Amicus-US 30-31.

But Mr. Wood has not suggested that this was the state's strategy. Rather, what the record shows (by the state's own admission in the district court) is that the state's strategy was to forego litigation of a difficult issue involving unsettled state law in favor of what the state saw as an easier path to victory. As a practical matter, the state's decision also reduced the risk of the district court finding that an evidentiary hearing was necessary, a finding that would also have necessitated the appointment of counsel for Wood. Even if "sandbagging" and these latter consequences were not the motivation for the state's relinquishment of its right to raise a limitations defense here, adoption of the state's position would allow or even invite such tactics in other cases, a result expressly disfavored by this Court. *See Granberry v. Greer*, 481 U.S. 129, 132 (1987); *Wainwright v. Sykes*, 433 U.S. 72, 89-90 (1977).

The respondents presume erroneously that the only way they could have acted strategically in forgoing a

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limitations period simplified the litigation, eliminating any need for an evidentiary hearing and permitting the state to focus on the purely legal issues of exhaustion and the merits of Mr. Wood's unexhausted claims. *See* Pet. Br. at 38-42.

timeliness challenge to Wood's petition was if they had withheld the defense with the secret intent of using it later if necessary. Resp. Br. 50. But as just discussed, this is an unduly myopic conception of what it means to act strategically. Having incorrectly constricted the parameters of actual "strategic decisions," the state never deals with the strategic advantages it in fact gained, and the concomitant disadvantages Wood suffered, as the result of the state's choice to eliminate the limitations issue from the case. *See* Pet. Br. 39-42.

Here, not only did the state gain strategic advantages in the district court proceedings, it received a windfall when the Tenth Circuit, on its own initiative, resurrected the statute of limitations defense – a defense the parties and the district court all understood had been eliminated by the state's decision not to challenge timeliness.

Recall that, in the district court, Wood agreed to dismiss four constitutional claims that the state argued, and the district court agreed, were unexhausted. App. 81a. As the state recognized in its pre-answer response, two of the unexhausted claims were still pending in Wood's 1995 unresolved postconviction motion. App. 80; Record 101-102. Nevertheless, when offered the chance to pursue two constitutional claims that could not be challenged as unexhausted, in exchange for dismissing four other claims, Wood chose to go forward on the two claims that were indisputably exhausted. Record 248-269; App. 80a-82a.

When Wood made this choice, he did so with full assurance that his two remaining claims would not be challenged as untimely. App. 70a. If, instead, the state had elected to challenge the timeliness of Wood's petition in the district court, his options would have been quite different. As previously explained, the state's assertion of the timeliness issue could have resulted in a hearing on the issue and the appointment of counsel. Moreover, it could have resulted in Wood continuing to pursue the issues that were deemed unexhausted but had been raised in Wood's still un-ruled upon 1995 motion. Record 133-140.

c. The state's decision not to raise the limitations defense was not a mistake.

The state's decision not to challenge the timeliness of Wood's petition because of the unsettled nature of Colorado law bears no resemblance to the inadvertent counting mistake that led the respondent in *Day* to erroneously concede timeliness. Rather, the state's decision here was a deliberate waiver, or relinquishment of a known right.

Because *Day* affords district courts discretion to bypass and correct a respondent's patently erroneous concession of timeliness, the state strains to characterize its decision not to raise a timeliness defense as similarly mistaken. This case, however, is the opposite of *Day*, where the state's obvious error led it to erroneously concede timeliness. Here, the state affirmatively refused to concede timeliness, noting that the petition was in fact arguably out of time, and then expressly elected not to raise the issue.

The state claims that its deliberate decision not to challenge timeliness was merely a blunder, that it "labored under a mistaken understanding of law." The state insists that it did not act "intelligently" when it decided not to seek resolution in Wood's case of a difficult and unsettled question of Colorado law. Instead, the state insists, it was unintelligent in making a decision it now regrets, having been "mistaken," "inartful," and "cryptic" when it apprised the district court that it was not challenging, but was not conceding, timeliness. Resp. Br. 3, 15-19, 39, 41, 47.

These claims are belied by the record, which contradicts the state's assertion, an assertion of recent vintage, that its lawyer was mistaken about either the law or the facts, or both, when she informed the district court that, "[w]hile it is certainly arguable that the 1995 postconviction motion was abandoned before 1997 and thus did not toll the AEDPA statute of limitations at all, [citation and parenthetical omitted], Respondents will not challenge, but are not conceding the timeliness of Wood's petition in this pre-answer response." App. 70a. There is no mistake in this statement. The state's lawyer was correct. It was indeed arguable – but far from certain – that Wood's 1995 conviction could be deemed to have been abandoned and thus not to have tolled AEDPA's limitations period. Also correct were the assertions that preceded that one: "Because Wood's conviction was final in 1989 before the effective date of the AEDPA, his time for filing a petition began to run on April 24, 1996, when the AEDPA became effective. Thus, he had until April 24, 1997, *plus any tolling periods*, to timely file his habeas petition." App. 69-70a (emphasis added).

2. The State's Admitted Forfeiture of the § 2244(d) Statute of Limitations Defense Should Preclude the Appellate Court from Raising the Very Limitations Defense the State Itself Could Not Raise on Appeal.

The first question presented, as framed by the Court, is: "[d]oes an appellate court have the authority to raise *sua sponte* a 28 U.S.C. § 2244(d) statute of limitations defense?" The Respondents and Solicitor General, as amicus, assert that the answer to this question is "yes" so long as the state has not "deliberately waived" the defense. Resp. Br. 2-3; US-Amicus 9. Petitioner agrees that an appellate court may have authority to *sua sponte* raise a § 2244(d) limitations defense in certain circumstances.[5] But he urges this Court to, at a minimum, draw a line where, as here, the state's forfeiture of the limitations defense is purposeful and to hold that courts are not free to disregard such "purposeful forfeitures" of § 2244(d) limitations defenses on appeal.[6]

Traditionally, when a district court rules on the merits of an issue after a litigant has had an opportunity to raise the statute of limitations defense and has chosen not to, the affirmative defense is no longer part of the case. *See Kontrick v. Ryan*, 540 U.S. 443, 459-60 (2004); *Sasser v. Norris*, 553 F.3d 1121, 1128 (8th Cir. 2009); *see also* Wright & Miller, 5 *Fed. Prac. & Proc. Civ.* § 1278. Consequently, an appellate court lacks authority to raise the defense on its own.

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5. For example, it is not uncommon for habeas cases to be decided in the district courts and the appellate courts without the state even being required to file a response. *See generally* Habeas Rules 4, 5(a); 10th Cir. R. 22.1(B) ("Respondents-appellees shall not file a brief until requested to do so by this court."). In such cases, an appellate court may raise a petition's timeliness on its own initiative; otherwise the timeliness of the petition could never be considered.

6. The term "purposeful forfeiture" is used in this brief to distinguish a forfeiture that occurs as a result of a litigant's deliberate decision not to assert a defense from a forfeiture that occurs as a result of a litigant's silence or inadvertence.

The application to habeas proceedings of this longstanding, well-accepted rule governing the loss of forfeited affirmative defenses is consistent with 1) Congressional intent, as discerned from Congress's adoption in AEDPA of a traditional statute of limitations, 2) this Court's precedent governing non-jurisdictional claims-processing rules, and 3) the applicable federal rules of civil procedure. *See* Pet. Br. Arg't I at 23-31. Application of the traditional forfeiture rule to the § 2244(d) limitations defense would also advance AEDPA's goals of streamlining habeas proceedings, judicial economy and conservation of judicial resources, by ensuring that district courts may efficiently dismiss untimely petitions at the outset without expending unnecessary resources. *See generally Rhines v. Weber*, 544 U.S. 269, 276-277 (2005).

The state asserts, however, that traditional forfeiture rules do not prevent an appellate court's *sua sponte* exercise of authority to consider a § 2244(d) limitations defense, because traditional forfeiture principles do not apply to any habeas defenses since they implicate values beyond the concerns of the parties. But, as this Court has recognized, AEDPA's statute of limitations does not implicate the same federalism and comity concerns as other habeas defenses. *See e.g., Holland v. Florida*, 130 S.Ct. 2549, 2563 (2010) (distinguishing procedural default rules, which concern "a *state court's* procedural rules" and "*federal* timing rules," which do not); *Day v. McDonough*, 547 U.S. at 214-15 (Scalia, J., dissenting) (distinguishing the statute of limitations from other habeas defenses that were created by the courts themselves, in the exercise of their traditional equitable discretion); *Pace v. DiGuglielmo*, 544 U.S. 408, 417 (2005) ("For purposes of determining what are 'filing' conditions, there is an obvious distinction between time limits, which go to the very initiation of a petition and a court's ability to consider that petition, and the type of 'rule of decision' procedural bars . . . , which go to the ability to obtain relief."). Accordingly, the authority of appellate courts to *sua sponte* raise non-statutory habeas defenses does not necessarily extend to the § 2244(d) statute of limitations defense.

Petitioner acknowledges that *Granberry* permits appellate courts to address the exhaustion requirement when raised for the first time on appeal. *See id.*, 481 U.S. at 133. And he also acknowledges the language in *Day* that it makes "scant sense" to distinguish AEDPA's time bar "from other threshold constraints on federal habeas petitioners." 547 U.S. at 209. But the forfeitures at issue in *Day*, and in *Granberry* – an "inadverten[t]" failure to assert the defense by a prosecutor who "was not even aware of the exhaustion requirement," – bear little resemblance to the state's actions in this case. 481 U.S. at 132, n.5. And there remain good reasons for this Court to draw a line at appellate consideration of purposefully forfeited § 2244(d) limitations defenses.

First, as discussed in petitioner's brief at 18-19, 32, one of *Day*'s primary reasons for allowing a district court to raise the defense on its own motion does not apply to appellate courts: that requiring enforcement of the traditional forfeiture rule in the district court would amount to meaningless formalism in light of the fact that a district court's authority to allow free amendment of pleadings would permit it to simply inform the state of its error in conceding the defense. The same is not true on appeal, and neither the state nor its amici argue otherwise.

Second, while district courts are empowered (indeed, required) to *sua sponte* review habeas petitions for obvious procedural defects, *see* Habeas Rule 4, the courts of appeal lack such authority. The state seeks to equate the appellate courts' authority to issue or deny a certificate of appealability (COA) with the Rule 4 pre-screening authority vested in district courts, Resp. Br. at 27-28, but the two are hardly equivalent. The COA power does not give appellate courts, as Rule 4 gives the district courts, the free-roving authority to peruse a habeas petition for reasons to dismiss it. It simply allows an appellate court to decide which of the claims asserted by a habeas petitioner can go forward on appeal. *See* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b). The circuit courts' authority to cull weak issues from strong ones by no means implies the authority to entirely dismiss a petition based on a procedural defense no one has raised.

In the appellate context presented here, the statute of limitations defense should be governed by the Federal Rules of Civil Procedure, given that the federalism and comity concerns that authorize appellate courts to consider other habeas defenses *sua sponte* do not apply to the limitations defense. Accordingly, a § 2244(d) defense, like all non-jurisdictional statutes of limitation, should not be resurrected by an appellate court where, as here, the state had the opportunity to raise the defense and failed to do so before the district court ruled on the merits.

The Solicitor General, as amicus, however, asserts that "[a]fter *Day,* it is clear that a federal court is not bound by a State's failure to comply with the letter of the federal civil or habeas rules–both of which require a litigant to raise a statute of limitations defense in a responsive pleading–and petitioner's continued reliance on those rules is unavailing." Amicus-US Br. 20-21. This argument goes too far.

Admittedly, *Day* did not require hyper-technical compliance with Habeas Rule 5, which requires a respondent to state in its answer if a claim is time-barred. But the result in *Day* was consistent with both the Habeas Rules and the Federal Rules of Civil Procedure, in that Habeas Rule 4 authorizes courts to dismiss petitions that are clearly untimely, and Fed. R. Civ. Proc. 15(a)(2) provides that courts "should freely give leave [to amend pleadings] when justice so requires." Accordingly, at the district-court stage of the case at issue in *Day*, the applicable rules would have allowed the state to amend its answer and raise the defense itself. In contrast, the result urged by amici and the state, which would allow *appellate* courts to raise *sua sponte* forfeited limitations defenses in habeas cases, is contrary to the governing civil rules, which do not allow parties to raise affirmative defenses for the first time on appeal. *See* Pet. Br. 25-28.

Even in areas of law that implicate interests beyond those of the parties, such as AEDPA and the Prison Litigation Reform Act of 1995 (PLRA), Pub. L. No. 104-134, 110 Stat. 1321-66, as amended, 42 U.S.C. § 1997e *et seq.*, this Court recognizes the need for clear and predictable procedural rules. *See e.g., Jones v. Bock*, 549 U.S. 199, 212 (2007) ("courts should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns."). Nothing in either the language of AEDPA or the applicable federal rules suggests Congress intended that the § 2244(d) statute of limitations defense would be immune from forfeiture or waiver if not asserted in a timely fashion. *Compare* 28

U.S.C. § 2254(b)(3) ("A State shall not be deemed to have waived the *exhaustion* requirement or be estopped from reliance upon the requirement unless the State, through counsel, waives the requirement") (emphasis added).

In addition, the concerns underlying AEDPA are not limited to "federalism, finality and comity" as stressed by the state. AEDPA is also designed to safeguard habeas review of meritorious federal issues, and to promote judicial efficiency and conservation of judicial resources. *See, e.g., Panetti v. Quarterman*, 551 U.S. 930, 946 (2007); *Day*, 547 U.S. at 205-206. These concerns were advanced in the district court scenario presented in *Day*, where the district court noticed that the state had erroneously conceded timeliness, and consequently ordered the petitioner to show cause why his petition should not be dismissed. These same concerns are not promoted in the least when, as here, the state does not raise the limitations defense in the district court, that court then expends considerable effort and resources deciding substantial exhaustion and merits issues, and the court of appeals then *sua sponte* raises the limitations defense and decides the case on that basis.

This case well illustrates the virtues of applying to habeas appeals the traditional rule governing statute of limitations defenses, whereby the defense is lost if not timely raised. There are two sets of interests at stake in habeas proceedings: the parties' interest in the preservation of the adversarial system and the courts' interest in timely and efficient proceedings. The timely assertion of a limitations defense in the district court furthers both interests, and is required by the rules. *See* Habeas Rule 5; Fed. R. Civ. Proc. 8(c); 12(b).

3. The Court of Appeals Abused its Discretion and Erred When it *Sua Sponte* Raised the § 2244(d) Statute of Limitations Defense and Affirmed The District Court's Merits Decision Based Solely on its Determination that Wood's Petition was Untimely.

The state argues that the Tenth Circuit "appropriately resolved the forfeited limitations issue" when it *sua sponte* raised the statute of limitations and held that Wood's petition was untimely. Resp. Br. 49-51, Arg't III. At the same time, the state claims the issue it raises is not within the scope of either question presented. *Id.* at 49. Nevertheless, since the state has raised this issue separately, Mr. Wood will respond to it briefly.[7]

Assuming *arguendo* that it was permissible for the Tenth Circuit to raise the timeliness issue after the state purposefully forfeited the defense, the court of appeals was still required to assure itself that Wood was not significantly prejudiced by the delayed focus on the limitations issue and to "'determine whether the interests of justice would be better served' by addressing the merits or by dismissing the petition as time barred." *Day*, 547 U.S. at 210, quoting *Granberry*, 481 U.S. at 136.

The Tenth Circuit cited *Day*, App. 139-140a n.2, but the record does not support the findings required by *Day* for the court to have properly raised and decided the timeliness of Wood's petition *sua sponte*. In contrast to

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[7] Aside from the question of whether this issue is a subsidiary issue fairly included in the questions presented, this argument is moot if this Court rules in Mr. Wood's favor on either of the two issues presented.

Day, where the district court confronted a petition that was obviously untimely, here the court of appeals was confronted with a petition that appeared to be timely.[8] In *Day*, the rules, common sense and general policy concerns all favored the district court raising the timeliness of the petition *sua sponte*; the same is not true here where, at most, whether Wood's petition was untimely was debatable.

Also unlike *Day*, Wood was significantly prejudiced by the delayed focus on timeliness. *Nothing* occurred in *Day* between the time the state filed its answer erroneously conceding timeliness and when the magistrate judge noticed the state's calculation error and ordered Day to show cause why his petition should not be dismissed. Here, a great deal happened between the time the state told the district court it was not challenging timeliness and when the court of appeals *sua sponte* raised the timeliness issue and resolved it against Wood. As explained elsewhere, Wood was clearly prejudiced by the delayed focus on the timeliness issue. *See* pp. 9-10, *supra*; Pet. Br. 39-41.

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[8] In fact, Wood's petition was timely, and the court of appeals erred in concluding otherwise. Although the state boldly asserts that Wood's petition was "clearly untimely," it offers no support for its assertion. Resp. Br. 16. It is undisputed that Wood's 1995 state postconviction motion was "properly filed." Thus, the sole question is whether the 1995 motion was still "pending" when Wood filed his 2004 postconviction motion. If it was, his § 2254 federal habeas petition is timely, since it was filed exactly one year after the Colorado Supreme Court denied certiorari in Wood's appeal from the denial of the 2004 motion. *See Carey v. Saffold*, 536 U.S. 214, 219 (2002) (dictionary defines "pending" as "in continuance" or "not yet decided"); *Lawrence v. Florida*, 549 U.S. 327, 331 (2007)(one-year limitations period runs from state court's denial of certiorari in state postconviction appeal). The Tenth Circuit's decision that Wood's habeas petition was untimely depends on its factual finding that the 1995 motion was abandoned some time before the 2004 motion was filed. However, Colorado law did not even recognize the possibility that a properly filed state postconviction motion could be abandoned due to the passage of time until only recently. *See People v. Valdez*, 178 P.3d 1269 (Colo. App. 2007). Pursuant to *Valdez*, abandonment of a postconviction motion due to the passage of time is a factual question, and an individual is entitled to an evidentiary hearing before his postconviction motion may be deemed abandoned. *See id.* at 1281-82.

In Wood's case, the court of appeals' finding that "the interests of justice would be served in reaching the timeliness issue given the extensive time period involved"[9] is undermined by its failure to recognize that (1) the state acted strategically in forgoing the defense, and (2) Wood suffered prejudice by the delayed focus on timeliness. In assessing the "interests of justice," the court of appeals also gave no weight to the vital role the writ of habeas corpus plays in protecting constitutional rights. *See Holland v. Florida*, 130 S. Ct. 2549, 2562 (2010); *Slack v. McDaniel*, 529 U.S. 473, 483 (2000).

This is a case in which the Tenth Circuit granted a certificate of appealability on two serious constitutional issues, finding that reasonable jurists could disagree as to the district court's decision to deny relief on Wood's constitutional claims. App. 123-130a.

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[9] The passage of time in this case is almost entirely attributable to what transpired in the state courts, since there is no dispute that Wood filed his § 2254 petition within a year of the state courts' resolution of his postconviction claims. Notably, Colorado placed no time-bar on postconviction challenges to class one felony convictions like the one challenged by Wood. *See* Colo. Rev. Stat. § 16-5-402. And, prior to 2004, Colorado placed no time limits on the resolution of postconviction motions.

For the reasons set forth above and throughout petitioner's briefs, the court of appeals abused its discretion when it *sua sponte* raised the limitations defense and ruled against Mr. Wood without considering his and society's interest in resolving the constitutional claims before it.

CONCLUSION

For the reasons set forth above and in the Brief for Petitioner, Mr. Wood requests that this Court reverse the decision of the United States Court of Appeals for the Tenth Circuit and remand the cause for further proceedings.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

No. 10-9995

In the Supreme Court of the United States

PATRICK WOOD, PETITIONER

v.

KEVIN MILYARD, WARDEN, ET AL.

*ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT*

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTIONS PRESENTED

1. Whether an appellate court has the authority to raise *sua sponte* a 28 U.S.C. 2244(d) statute of limitations defense.

2. Whether the State's declaration before the district court that it "will not challenge, but [is] not conceding, the timeliness of [petitioner's] habeas petition" amounts to a deliberate waiver of any statute of limitations defense that the State may have had.

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In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

This case presents the questions whether a court of appeals has the authority to raise *sua sponte* a 28 U.S.C. 2244(d) statute of limitations defense and, if so, whether the State's statements here constituted a deliberate waiver of that defense. Although this case involves a claim by a state prisoner under 28 U.S.C. 2254, the one-year time limit for a state prisoner to file a habeas petition is the same as the period within which a federal prisoner must file a motion for postconviction relief. See 28 U.S.C. 2244(d)(1); 28 U.S.C. 2255(f) (Supp. IV 2010). Because the Court's decision here will likely affect cases presenting similar questions under Section 2255, the United States has a substantial interest in the resolution of this case.

STATEMENT

1. In 1986, petitioner shot and killed the assistant manager of a pizza delivery store during a robbery. He was charged in Colorado state court with first-degree murder after deliberation, first-degree felony murder, aggravated robbery, and two counts of felony menacing, and his first trial ended in a mistrial. Petitioner thereafter agreed to a bench trial, and the court found him guilty of second-degree murder, as well as felony murder, robbery, and menacing. The court merged the robbery and murder counts and sentenced petitioner to a lifetime term of imprisonment, plus two four-year terms of imprisonment for the menacing counts, all running concurrently. The Colorado Court of Appeals affirmed and, on October 23, 1989, the Colorado Supreme Court denied certiorari. J.A. 114a, 136a-137a.

2. In 1994, petitioner filed a pro se petition for federal habeas relief. The district court dismissed the petition because petitioner had failed to exhaust his state court remedies. J.A. 114a-115a, 137a.

In June 1995, petitioner filed a pro se motion for postconviction relief in state court and sought appointment of postconviction counsel. In October 1995, petitioner filed a motion seeking a ruling and, on December 1, 1995, the state court responded by appointing postconviction counsel. During the ensuing eight years, petitioner and the court took no further action with respect to that motion. In April 2004, petitioner wrote a letter to the court, but the substance of that letter is not in the record. J.A. 10a-11a, 115a, 137a-138a.

On August 30, 2004, petitioner filed a second pro se motion for postconviction relief in state court. J.A. 11a, 115a, 138a. On the first page of his new motion, petitioner "prominently stated that '[n]o other postconviction proceedings [had been] filed.'" J.A. 138a (brackets in original; citation omitted). The state postconviction court denied the new motion and the Colorado Court of Appeals affirmed. *Ibid.* On February 5, 2007, the Colorado Supreme Court denied certiorari. *Ibid.*

3. Exactly one year later, on February 5, 2008, petitioner filed a petition for federal habeas relief under 28 U.S.C. 2254. J.A. 13a-28a. In response to a question on the preprinted habeas form asking petitioner to list each postconviction proceeding he had previously initiated, petitioner identified only his August 2004 state postconviction motion. J.A. 17a-19a.

Before requiring the State to file an answer, the magistrate judge ordered petitioner to show cause why his petition should not be dismissed as barred by 28 U.S.C. 2244(d)'s one-year statute of limitations. J.A. 29a-33a; see Rule 4 of the Rules Governing Section 2254 Cases (Section 2254 Rules). The order explained that, because petitioner's conviction became final before the one-year limitations period was enacted into law as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 101, 110 Stat. 1217 (28 U.S.C. 2244(d)), petitioner would have had to file his petition by April 24, 1997, unless he qualified for statutory or equitable tolling. J.A. 32a; see *Carey* v. *Saffold*, 536 U.S. 214, 217 (2002); 28 U.S.C. 2244(d)(2) (providing for statutory tolling while a "properly filed" state postconviction motion is pending). The order further noted that petitioner's August 2004 postconviction motion would not toll the limitations period because it was filed "over seven years after" the time limit had expired. J.A. 32a. In response, petitioner failed to mention his 1995 state postconviction motion, J.A. 34a-40a, and the district court accordingly dismissed the petition as time barred, J.A. 41a-46a.

Petitioner moved for reconsideration and again failed to mention his 1995 postconviction motion. J.A. 47a-60a. The district court granted petitioner's motion, J.A. 61a-63a, and ordered the State "to file a Pre-Answer Response limited to addressing the affirmative defenses of timeliness under 28 U.S.C. § 2244(d) and/or exhaustion of state court remedies under 28 U.S.C. § 2254(b)(1)(A)," J.A. 64a-65a.

In its pre-answer response, the State argued that the petition was subject to dismissal because some of petitioner's claims had not been exhausted in state court. Pre-Answer Response 4-13. As to the limitations defense, the State explained that petitioner "had until April 24, 1997, plus any tolling periods, to timely file his habeas petition," and that if petitioner had only filed the 2004 motion for state postconviction relief, his petition "clear[ly]" would be untimely. J.A. 70a. The State, however, informed the district court for the first time that petitioner had also filed a 1995 postconviction motion. J.A. 68a. Noting that it was "unclear how the 1995 postconviction motion, which apparently was never ruled upon" should affect the timeliness of the federal habeas petition, the State suggested that it was "certainly arguable that the 1995 postconviction motion was abandoned before 1997 and thus did not toll" the statute of limitations period at all. J.A. 70a. The State concluded by stating that it "will not challenge, but [is] not conceding, the timeliness of [petitioner's] habeas petition in [its] pre-answer response." *Ibid.*

The district court agreed that several of petitioner's claims had not been properly exhausted and permitted petitioner to voluntarily dismiss those claims. J.A. 74a-

82a. The court then ordered the State to file an answer under Rule 5 of the Section 2254 Rules. J.A. 83a. In its answer, the State discussed the Section 2244(d) statute of limitations defense and stated that, "[a]s noted in the pre-answer response, the [State is] not challenging, but do[es] not concede, the timeliness of the petition. The [State] hereby incorporate[s] the arguments raised in the pre-answer response into this answer." J.A. 87a.

On July 6, 2009, the district court dismissed the two remaining claims on their merits, J.A. 96a-111a, and later denied a certificate of appealability, Order Denying Certificate of Appealability.

4. On January 4, 2010, the court of appeals granted a certificate of appealability on both exhausted claims and appointed counsel. J.A. 112a-130a. In its order, the court examined the state and federal court records and concluded that petitioner's habeas petition might not have been timely filed. J.A. 120a-123a. Because the court considered it to be "an important preliminary matter" given Section 2244(d)'s "purpose of bringing finality to state court criminal judgments," the court directed the parties to brief the timeliness of petitioner's habeas petition. J.A. 122a-123a.

On appeal, petitioner argued that his federal habeas petition was timely because the 1995 postconviction motion tolled the one-year limitations period under 28 U.S.C. 2244(d)(2). See Pet. C.A. Supp. Br. 18-23; Pet. C.A. Supp. Reply Br. 1-8. Petitioner did not argue that the State waived any statute of limitations defense or that the appellate court was otherwise without authority to raise that issue *sua sponte*, and he did not cite this Court's decision in *Day* v. *McDonough*, 547 U.S. 198 (2006). In its supplemental brief, the State argued that petitioner's habeas petition was untimely because the eight years of inaction constituted abandonment of the 1995 postconviction motion. Resp. C.A. Supp. Br. 17-23.

5. In an unpublished opinion, the court of appeals affirmed the district court on alternative grounds. J.A. 135a-144a. The court explained that "[a]lthough the district court's ultimate disposition of this case rested on grounds other than timeliness," it had "discretion to affirm on any ground adequately supported by the record." J.A. 139a n.2 (quoting *Davis* v. *Roberts*, 425 F.3d 830, 834 (10th Cir. 2005)). The court recognized that, in *Day*, this Court had advised federal courts that they could not "'override a State's deliberate waiver of a limitations defense' and sua sponte dismiss a habeas petition." *Ibid.* (quoting 547 U.S. at 202). Looking to the State's district court filings, the court of appeals noted that the State "provided a cryptic response to the timeliness question," but concluded that it did not amount to "a deliberate waiver" when read in context. *Ibid.* The court further determined that consideration of the timeliness defense was "particularly apt in this case, given that the issue was raised in the district court and addressed by [petitioner], the parties have briefed the issue on appeal, and the interests of justice would be served in reaching [it] given the extensive time period involved." *Ibid.* The court therefore decided to exercise its authority to consider whether the habeas petition was timely filed and concluded that it was not. J.A. 139a-144a.[1]

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[1] In his petition for panel rehearing, petitioner argued for the first time that the State had deliberately waived the limitations defense and that the court of appeals erred in considering it. See Pet. for Panel Reh'g 3-9. Petitioner did not contend that the court of appeals otherwise lacked authority to consider the limitations defense on its own motion.

SUMMARY OF ARGUMENT

I. A federal appellate court has the authority to give effect to the one-year statute of limitations period Congress has established for federal court review of state court convictions, even if the State has failed to preserve that defense. The court of appeals can enforce, on its own motion, several other habeas defenses that implicate the same institutional interests as AEDPA's time bar. And the limitations defense itself can be vindicated by the district court *sua sponte*. The State's failure to assert (and the district court's failure to enforce) the one-year limitations period does not deprive an appellate court of its inherent authority to give effect *sua sponte* to Congress's determination that federal courts should not hear untimely petitions.

Nothing in the statutes or rules concerning habeas procedure, the rules governing civil proceedings generally, or this Court's case law divests an appellate court of its independent authority to abide by the limitations on habeas review. Any suggestions to the contrary are squarely foreclosed by this Court's decision in *Day* v. *McDonough*, 547 U.S. 198 (2006), and the long line of cases on which *Day* relied. The limitations defense is "on a par" (*id.* at 209) with other procedural bars to habeas relief (*e.g.*, exhaustion, nonretroactivity, procedural default) that appellate courts can enforce *sua sponte*, and neither law nor logic supports a different rule for untimely petitions.

II. The court of appeals did not abuse its discretion by reaching the timeliness issue in this case. That petitioner suffered no prejudice and had ample opportunity to respond (in the district court and on appeal) is beyond dispute. And, given the extensive time period involved, the interests of justice were best served by dismissing the petition as untimely.

The court of appeals would have abused its discretion had it overridden a clear and unambiguous decision by the State to waive a known meritorious limitations defense. See *Day*, 547 U.S. at 202, 210 n.11. But the State's "cryptic" (J.A. 140a n.2) comments in the district court, when viewed in context, fall short of a clear and unambiguous waiver. And, importantly, the State clarified any ambiguity on appeal when it forcefully argued that the petition was untimely. In light of the substantial institutional interests in finality and judicial efficiency that AEDPA's limitations bar protects, the court of appeals cannot be said to have "override[n]" (*Day*, 547 U.S. at 202) any deliberate waiver by the State.

ARGUMENT

I. A COURT OF APPEALS HAS THE AUTHORITY TO DISMISS AN UNTIMELY HABEAS PETITION *SUA SPONTE*

In order "to advance the finality of criminal convictions," Congress "adopted a tight time line, a one-year limitations period" for federal habeas cases. *Mayle* v. *Felix*, 545 U.S. 644, 662 (2005); see 28 U.S.C. 2244(d)(1); 28 U.S.C. 2255(f) (Supp. IV 2010). AEDPA's limitations period "quite plainly serves the well-recognized interest in the finality of state court judgments"; it "reduces the potential for delay on the road to finality by restricting the time that a prospective federal habeas petitioner has in which to seek federal habeas review." *Rhines* v. *Weber*, 544 U.S. 269, 276 (2005) (quoting *Duncan* v. *Walker*, 533 U.S. 167, 179 (2001)). To further that policy, and in accord with relevant precedent, this Court held in *Day* v. *McDonough*, 547 U.S. 198 (2006), that a federal district court may dismiss an untimely habeas petition *sua sponte*, even when the State fails to raise a statute of limitations defense in its answer. Under that same policy, and consistent with that same case law, an appellate court likewise has the discretionary authority to dismiss untimely habeas petitions on its own motion.

A. A Federal Appellate Court Has The Authority To Enforce *Sua Sponte* AEDPA's Statute Of Limitations Under This Court's Precedents And Sound Habeas Policy

AEDPA's statute of limitations is not jurisdictional. See *Holland* v. *Florida*, 130 S. Ct. 2549, 2560 (2010); *Day*, 547 U.S. at 205. It is a nonjurisdictional defense subject to forfeiture and waiver, *Holland*, 130 S. Ct. at 2560, and the State does not dispute that it forfeited that defense by failing to challenge the habeas petition as untimely in the district court, Resp. Br. 17, 46. Additionally, a federal appellate court is not obliged to excuse a State's forfeiture or to raise the timeliness issue on its own motion. Cf. *Gonzalez* v. *Thaler*, No. 10-895 (Jan. 10, 2012), slip op. 5 ("When a requirement goes to subject-matter jurisdiction, courts are obligated to consider *sua sponte* issues that the parties have disclaimed or have not presented."). The first question presented, as reformulated by this Court, asks whether a federal appellate court *may* raise a Section 2244(d) statute of limitations defense, despite the State's forfeiture. The answer is yes.[2]

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[2] Petitioner at times conflates the two questions presented by limiting the first question to circumstances where there purportedly has been a deliberate waiver. See Pet. Br. 23, 33. For purposes of answering the first question, the Court need only decide whether a court of appeals is categorically precluded from enforcing AEDPA's statute of limitations defense on its own motion. If the Court rejects that position, it may then address the deliberate-waiver question. See Part II, *infra*.

1. In *Day*, this Court held that "district courts are permitted, but not obliged, to consider, *sua sponte*, the timeliness of a state prisoner's habeas petition." 547 U.S. at 209. Based on an apparent computation error, the State in that case had incorrectly conceded in its answer that the petition was timely filed. *Id.* at 203. Despite that concession, the district court dismissed the petition as time barred and the court of appeals affirmed. *Id.* at 204. The question presented to this Court was "whether a federal court lacks authority, on its own initiative, to dismiss a habeas petition as untimely, once the State has answered the petition without contesting its timeliness." *Id.* at 202. The Court held that a federal district court may dismiss a habeas petition as untimely in those circumstances, so long as the parties are afforded "fair notice and an opportunity to present their positions," the habeas petitioner "is not significantly prejudiced," and "the interests of justice" are better served "by dismissing the petition as time barred." *Id.* at 210 (citation omitted).

2. Contrary to petitioner's contention, this Court's decision in *Day* is not a "limited exception" to a "well-settled principle that a litigant who fails to plead an affirmative defense waives any right to assert it." Pet. Br. 18; see *id.* at 29-30, 32 (referring to *Day* as an "exception"); *Barnett* v. *Roper*, 541 F.3d 804, 807 (8th Cir. 2008) (declining to "extend" *Day's* "exception"), cert. denied, 130 S. Ct. 63 (2009). This Court has long recognized the distinctive role the judiciary plays in enforcing limitations on habeas relief in order to promote finality and reduce federal-state friction—even where doctrines of forfeiture might otherwise preclude enforcement in civil litigation. *Day* is simply the latest application of that general principle.

In *Granberry* v. *Greer*, 481 U.S. 129 (1987), this Court held that federal courts of appeals "have discretion to consider the issue of exhaustion despite the State's failure to interpose the defense at the district-court level." *Day*, 547 U.S. at 206 (citing 481 U.S. at 133); see *id.* at 217 (Scalia, J., dissenting) (noting that "the *Granberry* regime allows the forfeited procedural defense to be raised for the first time on appeal, either by the State or by the appellate court *sua sponte*"). In that case, the Court rejected two "extreme" positions: that a court of appeals is either precluded from, or required to, "dismiss [a habeas petition] for nonexhaustion notwithstanding the State's failure to raise it." *Granberry*, 481 U.S. at 133. Instead, the Court adopted an "intermediate approach," whereby appellate courts should "exercise discretion in each case to decide whether the administration of justice would be better served by insisting on exhaustion or by reaching the merits of the petition forthwith." *Id.* at 131, 133.

Consistent with its decision in *Granberry*, the Court subsequently held that a reviewing court may apply the nonretroactivity rule announced in *Teague* v. *Lane*, 489 U.S. 288, 310 (1989) (plurality opinion), even if the State fails to raise it. See *Caspari* v. *Bohlen*, 510 U.S. 383, 389 (1994) (holding that "a federal court may, but *need not*, decline to apply *Teague* if the State does not argue it") (emphasis added); *Schiro* v. *Farley*, 510 U.S. 222, 228-229 (1994) (declining to address nonretroactivity defense that the State failed to raise in the lower courts, but noting that the Court "undoubtedly" had "the discretion to reach" the issue); see also *Day*, 547 U.S. at 206 (discussing *Caspari* and *Schiro*).

And while this Court has never decided the issue, see *Trest* v. *Cain*, 522 U.S. 87, 90 (1997), the overwhelming majority of courts of appeals have concluded that they have discretion to consider whether a habeas petitioner's claims are procedurally defaulted despite the State's failure to properly assert that defense.[3] See *Ortiz* v. *Dubois*, 19 F.3d 708, 714-715 (1st Cir. 1994), cert. denied, 513 U.S. 1085 (1995); *Washington* v. *James*, 996 F.2d 1442, 1447-1448 (2d Cir. 1993), cert. denied, 510 U.S. 1078 (1994); *Szuchon* v. *Lehman*, 273 F.3d 299, 321 & n.13 (3d Cir. 2001); *Yeatts* v. *Angelone*, 166 F.3d 255, 260-262 (4th Cir.), cert. denied, 526 U.S. 1095 (1999); *Smith* v. *Johnson*, 216 F.3d 521, 523-524 (5th Cir. 2000) (per curiam); *Lorraine* v. *Coyle*, 291 F.3d 416, 426 (6th Cir.), modified on denial of reh'g, 307 F.3d 459 (2002), cert. denied, 538 U.S. 947 (2003); *Perruquet* v. *Briley*, 390 F.3d 505, 515-519 (7th Cir. 2004); *King* v. *Kemna*, 266 F.3d 816, 821-822 (8th Cir. 2001) (en banc), cert. denied, 535 U.S. 934 (2002); *Windham* v. *Merkle*, 163 F.3d 1092, 1100-1101 (9th Cir. 1998); *Manlove* v. *Tansy*, 981 F.2d 473, 476 n.4 (10th Cir. 1992). But cf. *Smith* v. *Secretary, Dep't of Corr.*, 572 F.3d 1327, 1339-1342 (11th Cir. 2009) (suggesting that under AEDPA different waiver rule applies to procedural default based on nonexhaustion); *United States* v. *Barron*, 172 F.3d 1153, 1156-1157 (9th Cir. 1999) (en banc) (declining to consider forfeited procedural-default defense in Section 2255 case based on absence of "extraordinary circumstances"). As the Fourth Circuit explained, "in the presence of overriding interests of comity and judicial efficiency that transcend the interests of the parties," a federal appellate court "may, in its discretion, deny federal habeas relief on the basis of issues that were not preserved or presented properly by a state." *Yeatts*, 166 F.3d at 261.[4]

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[3] In *Trest*, the Court held only that courts of appeals are not obliged to raise a procedural bar *sua sponte*, but declined to decide whether they had discretion to do so. 522 U.S. at 89-90.

This Court in *Day* relied on *Granberry*, *Caspari*, *Schiro*, and the procedural-default case law to hold that "district courts are permitted, but not obliged, to consider, *sua sponte*, the timeliness of a state prisoner's habeas petition." 547 U.S. at 209. The Court explained that "it would make scant sense to distinguish in this regard AEDPA's time bar from [these] other threshold constraints on federal habeas petitioners." *Ibid.*; see *id.* at 205-206. Indeed, as this Court observed, the current version of Rule 5(b) of the Section 2254 Rules places the statute of limitations defense "on a par" with "failure to exhaust state remedies," "procedural bar," and "nonretroactivity." *Id.* at 209 (quoting Rule 5(b) of the Section 2254 Rules). And because the limitations defense "advances the same concerns as those advanced by the doctrines of exhaustion and procedural default," as well as nonretroactivity, the Court agreed that they "must be treated the same." *Id.* at 209 (quoting *Long* v. *Wilson*, 393 F.3d 390, 404 (3d Cir. 2004)).

Granberry, *Caspari*, and *Schiro* did not concern the authority of federal *district* courts, and the procedural-default case law overwhelmingly extends to the courts of appeals. As applied by this Court in *Day*, that precedent equally compels the conclusion that courts of appeals are likewise permitted, but not obliged, to consider, *sua sponte*, the timeliness of a state prisoner's habeas petition.

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[4] The courts of appeals have also held that, in appropriate circumstances, they may conduct harmless error review in a habeas proceeding, even if the State failed to properly argue harmlessness. See *Miller* v. *Stovall*, 608 F.3d 913, 927 (6th Cir. 2010), vacated on other grounds, 132 S. Ct. 573 (2011); *Jones* v. *Cain*, 600 F.3d 527, 540-541 & n.12 (5th Cir. 2010); *Sanders* v. *Cotton*, 398 F.3d 572, 582 (7th Cir. 2005); *Horsley* v. *Alabama*, 45 F.3d 1486, 1492 n.10 (11th Cir.), cert. denied, 516 U.S. 960 (1995); *Lufkins* v. *Leapley*, 965 F.2d 1477, 1481-1482 (8th Cir.), cert. denied, 506 U.S. 895 (1992); cf. *Thomas* v. *Crosby*, 371 F.3d 782, 792-802 (11th Cir. 2004) (Tjoflat, J., specially concurring) (concluding that court of appeals had authority to consider legal issue habeas petitioner failed to raise in district court), cert. denied, 543 U.S. 1063 (2005).

3. The inherent authority of federal courts to enforce, on their own motion, procedural bars to habeas relief stems from the important principles of finality, judicial efficiency, comity, and federalism that are implicated by federal habeas review of state court judgments. See, *e.g.*, *Stone* v. *Powell*, 428 U.S. 465, 491 n.31 (1976). And those interests do not meaningfully dissipate after the district court enters its judgment.[5]

Even before AEDPA, this Court "impose[d] significant limits on the discretion of federal courts to grant habeas relief." *Calderon* v. *Thompson*, 523 U.S. 538, 554-555 (1998). "In light of 'the profound societal costs that attend the exercise of habeas jurisdiction,'" *id.* at 554 (quoting *Smith* v. *Murray*, 477 U.S. 527, 539 (1986)), it restricted, for example, the courts' ability to grant habeas relief on the basis of procedurally defaulted claims, *United States* v. *Frady*, 456 U.S. 152, 164-169 (1982); *Wainwright* v. *Sykes*, 433 U.S. 72, 81-91 (1977), retroactive application of "new rules," *Teague*, 489 U.S. at 303-310, non-prejudicial claims of trial error, *Brecht* v. *Abrahamson*, 507 U.S. 619, 637-638 (1993), or where the petitioner has abused the writ, *McCleskey* v. *Zant*, 499 U.S. 467, 477-496 (1991).

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[5] Federal courts have generally recognized that the systemic interests in finality and judicial efficiency are equally implicated by postconviction review of federal court judgments. See, *e.g.*, *United States* v. *Bendolph*, 409 F.3d 155, 162-164 (3d Cir. 2005) (en banc) (Section 2255 statute of limitations), cert. denied, 547 U.S. 1123 (2006); *Rosario* v. *United States*, 164 F.3d 729, 732-733 (2d Cir. 1998) (Section 2255 procedural default), cert. denied, 526 U.S. 1033, and 527 U.S. 1012 (1999); *United States* v. *Allen*, 16 F.3d 377, 378-379 & n.2 (10th Cir. 1994) (same); cf. *Danforth* v. *Minnesota*, 552 U.S. 264, 281 n.16 (2008) (noting that lower federal courts have also applied "the *Teague* rule" to motions under Section 2255).

In enacting AEDPA, Congress sought "to further the principles of comity, finality, and federalism" that gave rise to this Court's own limitations on habeas relief. *Williams* v. *Taylor*, 529 U.S. 420, 436 (2000); see *Mayle*, 545 U.S. at 662-663. In particular, Congress understood that collateral review of convictions undermines the finality that "is essential to both the retributive and the deterrent functions of criminal law," *Calderon*, 523 U.S. at 555, a concern that applies to postconviction review of federal as well as state convictions, *Frady*, 456 U.S. at 166; see *Woodford* v. *Garceau*, 538 U.S. 202, 206 (2003) (noting that one of AEDPA's purposes is "to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases").

To promote society's interest in the "finality" of criminal convictions and the "expeditious handling of habeas proceedings," AEDPA's limitation period was "designed to impose a tight time constraint on federal habeas petitioners." *Day*, 547 U.S. at 202, 208; see 28 U.S.C. 2244(d)(1); 28 U.S.C. 2255(f) (Supp. IV 2010). The limitations period "promotes judicial efficiency and conservation of judicial resources, safeguards the accuracy of state court judgments by requiring resolution of constitutional questions while the record is fresh, and lends finality to state court judgments within a reasonable time." *Day*, 547 U.S. at 205-206 (quoting *Acosta* v. *Artuz*, 221 F.3d 117, 123 (2d Cir. 2000)). Like the other limits on habeas review, AEDPA's statute of limitations "implicat[es] values beyond the concerns of the parties," *id.* at 205 (quoting *Acosta*, 221 F.3d at 123); reflects "the State's interest in the finality of convictions that have survived direct review within the state court system," *Calderon*, 523 U.S. at 555 (citation omitted); and helps alleviate the "heavy burden on scarce federal judicial resources [that] threatens the capacity of the system to resolve primary disputes," *McCleskey*, 499 U.S. at 491.

Because the costs associated with federal habeas review are "societal costs," *Calderon*, 523 U.S. at 554 (quoting *Smith*, 477 U.S. at 539), society's interests in enforcing the judicially and congressionally imposed limits on such review "transcend the concerns of the parties to [the] action." *Acosta*, 221 F.3d at 122 (citation omitted). As such, Congress has provided for federal courts to exercise a unique gatekeeper function. *E.g.*, Rule 4 of the Section 2254 Rules (providing that a district court "must promptly examine" the petition and "[i]f it plainly appears" that the petitioner "is not entitled to relief, * * * the judge must dismiss"); Rule 4(b) of the Rules Governing Section 2255 Proceedings (Section 2255 Rules) (same). That gatekeeping role is not limited to the district court. For example, a habeas petitioner cannot appeal "[u]nless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. 2253(c)(1); see Fed. R. App. P. 22(b). This process "screens out issues unworthy of judicial time and attention and ensures that frivolous claims are not assigned to merits panels." *Gonzalez*, No. 10-895, slip op. at 9. Congress also established "a 'gatekeeping' mechanism for the consideration of 'second or successive habeas corpus applications' in the federal courts." *Stewart* v. *Martinez-Villareal*, 523 U.S. 637, 641 (1998) (quoting *Felker* v. *Turpin*, 518 U.S. 651, 657 (1996)). Thus, "[b]efore a second or successive application [for a writ of habeas corpus] is filed in the district court, the applicant [must] move in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U.S.C. 2244(b)(3)(A); see Rule 9 of the Section 2254 Rules; see also 28 U.S.C. 2255(h) (Supp. IV 2010); Rule 9 of the Section 2255 Rules. As these provisions demonstrate, Congress intended federal courts (including appellate courts) to play a more active role in habeas proceedings than they generally do in traditional civil litigation.

4. Even in ordinary civil and criminal litigation, appellate courts retain some discretionary authority to consider forfeited legal issues that, like procedural bars in habeas proceedings, implicate institutional or systemic values that transcend the concerns of the litigating parties.

For example, this Court has recognized that it may be appropriate for a federal court to raise a res judicata defense on its own motion in "special circumstances," even though res judicata is "an affirmative defense ordinarily lost if not timely raised." *Arizona* v. *California*, 530 U.S. 392, 410, 412 (2000) (citing Fed. R. Civ. P. 8(c)). And several courts of appeals have raised preclusion defenses *sua sponte* in appropriate circumstances.[6]

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[6] *E.g.*, *Bechtold* v. *City of Rosemount*, 104 F.3d 1062, 1068-1069 (8th Cir. 1997) (raising res judicata on its own motion to affirm district court); *Russell* v. *SunAmerica Sec., Inc.*, 962 F.2d 1169, 1172 (5th Cir. 1992) (same); *United States* v. *Real Prop. Located in El Dorado Cnty.*, 59 F.3d 974, 979 n.3 (9th Cir. 1995) (raising collateral estoppel *sua sponte* to affirm district court); see also *B. Willis, C.P.A., Inc.* v. *BNSF Ry.*, 531 F.3d 1282, 1297-1298 (10th Cir. 2008) (citing cases); *Stanton* v. *District of Columbia Court of Appeals*, 127 F.3d 72, 77 (D.C. Cir. 1997) (noting that "even a *party's* forfeiture of the right to assert" res judicata, which did not happen in that case, "does not destroy a *court's* ability to consider the issue sua sponte"); 18 Charles Alan Wright,

That is because certain preclusion defenses are "not based solely on the defendant's interest in avoiding the burdens of twice defending a suit" but, like AEDPA's statute of limitations defense, they are "also based on the avoidance of unnecessary judicial waste." *Arizona*, 530 U.S. at 412 (quoting *United States* v. *Sioux Nation*, 448 U.S. 371, 432 (1980) (Rehnquist, J., dissenting)); see *Bechtold* v. *City of Rosemount*, 104 F.3d 1062, 1068 (8th Cir. 1997) (explaining that, with res judicata, "there is more at stake than relitigation between the parties"); *Stanton* v. *District of Columbia Court of Appeals*, 127 F.3d 72, 77 (D.C. Cir. 1997) (explaining that "res judicata belongs to courts as well as to litigants").

Similarly, every court of appeals to consider the issue has concluded that, in appropriate circumstances, appellate courts have discretion to consider whether an error was harmless even if the government failed to properly argue harmlessness. See *United States* v. *Rose*, 104 F.3d 1408, 1414-1415 (1st Cir.), cert. denied, 520 U.S. 1258 (1997); *United States* v. *Dolah*, 245 F.3d 98, 107 (2d Cir. 2001); *United States* v. *McLaughlin*, 126 F.3d 130, 135 (3d Cir. 1997), cert. denied, 524 U.S. 951 (1998); *United States* v. *Giovannetti*, 928 F.2d 225, 226-227 (7th Cir. 1991); *United States* v. *Causevic*, 636 F.3d 998, 1004 (8th Cir. 2011); *United States* v. *Gonzalez-Flores*, 418 F.3d 1093, 1100-1101 (9th Cir. 2005); *United States* v. *Doe*, 572 F.3d 1162, 1174-1176 (10th Cir. 2009), cert. denied, 130 S. Ct. 1687 (2010); *United States* v. *Adams*, 1 F.3d 1566, 1575-1576 (11th Cir. 1993), cert. denied, 510 U.S. 1198, and 510 U.S. 1206 (1994); *United States* v. *Pryce*, 938 F.2d 1343, 1348 (D.C. Cir. 1991), cert. denied,

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Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4405, at 89 & n.10 (2d ed. 2002).

503 U.S. 941, and 503 U.S. 988 (1992); see also *United States* v. *Peay*, 972 F.2d 71, 76 n.* (4th Cir. 1992) (Luttig, J., concurring in part and dissenting in part), cert. denied, 506 U.S. 1071 (1993); p. 13, n.4, *supra* (citing Fifth and Sixth Circuit habeas cases).[7] As the Seventh Circuit explained, when harmlessness has not been argued by the government, courts of appeals are "authorized" to consider harmless error "for the sake of protecting third-party interests including such systemic interests as the avoidance of unnecessary court delay." *Giovannetti*, 928 F.2d at 226. AEDPA's statute of limitations implicates similar systemic concerns.

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[7] These examples are not exhaustive. See, *e.g.*, *Cruz* v. *Melecio*, 204 F.3d 14, 22-25 & n.7 (1st Cir. 2000) (ordering stay of district court proceedings on abstention grounds not raised by the parties based on "considerations of federalism, comity, and sound judicial administration"). Indeed, as the court of appeals recognized, an appellate court retains the authority to affirm a lower court judgment "on any ground adequately supported by the record." J.A. 139a n.2 (citation omitted). And while a reviewing court may often decline to affirm on grounds that were not raised below, see *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 273 (2009), that is not a categorical limitation on the court's authority. See *United States* v. *Lawson*, 410 F.3d 735, 740 n.4 (D.C. Cir. 2005) ("[W]e may affirm on grounds other than those presented and relied on below."), cert. denied, 546 U.S. 1055 (2005); *Loftis* v. *UPS, Inc.*, 342 F.3d 509, 514 (6th Cir. 2003); *Jodoin* v. *Toyota Motor Corp.*, 284 F.3d 272, 277 n.2 (1st Cir. 2002); *Bechtold*, 104 F.3d at 1068; cf. *Schiro*, 510 U.S. at 228-229 (noting, with respect to forfeited *Teague* defense, that a respondent "is entitled to rely on any legal argument in support of the judgment below").

B. No Statute, Rule, Or Case Justifies Depriving An Appellate Court Of Its Inherent Authority To Enforce *Sua Sponte*, In Appropriate Circumstances, AEDPA's Limitations Defense

Petitioner does not dispute that an appellate court may enforce a variety of habeas defenses on its own motion. And petitioner acknowledges that a district court may dismiss an untimely habeas petition *sua sponte* under *Day*. Petitioner nevertheless contends that an appellate court categorically lacks power to enforce one particular habeas defense, the statute of limitations, on its own motion. No statute, rule, or case supports such an exception.

1. Petitioner first contends that the statute of limitations is an affirmative defense that is forfeited if not raised in a responsive pleading. Pet. Br. 25-26 (citing Fed. R. Civ. P. 8(c) and 12(b), and Rule 5(b) of the Section 2254 Rules). That is correct, but of little consequence.

The same was true in *Day*, yet this Court held that a district court could consider the timeliness of a state prisoner's habeas petition despite the State's failure to assert a limitations defense in its answer. 547 U.S. at 209; *id.* at 202 (noting that "[o]rdinarily in civil litigation, a statutory time limitation is forfeited if not raised in a defendant's answer or in an amendment thereto") (citing Fed. R. Civ. P. 8(c), 12(b), and 15(a)). In *Day*, the limitations defense was raised in the district court (indeed *by* the district court), but that is not a distinction found in the federal rules upon which petitioner relies. After *Day*, it is clear that a federal court is not bound by a State's failure to comply with the letter of the federal civil or habeas rules—both of which require a litigant to raise a statute of limitations defense in a *responsive pleading*—and petitioner's continued reliance on those rules is unavailing.

Moreover, this Court's decision in *Granberry* demonstrates that Rule 5(b) of the Section 2254 Rules is not dispositive. At the time of *Granberry*, Rule 5 specified only one affirmative defense that the State was required to address in its answer: "whether the petitioner has exhausted his state remedies including any post-conviction remedies available to him under the statutes or procedural rules of the state." 481 U.S. at 132 n.5; see Rule 5 of the Section 2254 Rules (1976). This Court observed that the rule imposed on the State "a duty to advise the district court whether the prisoner has, in fact, exhausted all available state remedies." *Granberry*, 481 U.S. at 134. The Court nevertheless held that the court of appeals "is not obligated to regard the State's omission as an absolute waiver of the claim." *Id.* at 133.

2. Rule 5(b) now sets forth four defenses that a State is required to raise in its answer, if one is filed. See Rule 5(b) of the Section 2254 Rules. No sound reason justifies categorically precluding an appellate court from considering a statute of limitations defense not asserted by the State, when that same court is free to consider unpreserved claims of exhaustion, nonretroactivity, and procedural default. See pp. 11-13, *supra*. To the extent petitioner suggests that the limitations defense is somehow different from all of those other defenses, the Court already rejected those arguments in *Day* and they are equally without merit here.[8]

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[8] Petitioner contends that the other habeas defenses, unlike AEDPA's statute of limitations, "were created by the courts in an exercise of their traditional equitable authority." Pet. Br. 28. Petitioner also argues that the limitations defense "does not raise the same

Petitioner relies on 28 U.S.C. 2254(b)(3), which provides that a "State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement." 28 U.S.C. 2254(b)(3). Based on that provision, petitioner contends that other defenses, as to which Congress has made no similar provision, are forfeited under the more stringent rules that purportedly apply to civil cases generally. Pet. Br. 22. But that statutory provision was not added to Section 2254 until AEDPA's enactment in 1996, § 104, 110 Stat. 1218, "nearly a decade after" this Court had already upheld, in *Granberry*, an appellate court's authority to address an exhaustion defense despite the State's failure to raise it in the district court. See *Day*, 547 U.S. at 206 n.4. And no statutory provision (then or now) addresses whether or when a State can waive nonretroactivity, yet this Court in *Schiro*, 510 U.S. at 229, held that a reviewing court "undoubtedly" has discretion to address that defense in the first instance. See *Caspari*, 510 U.S. at 389. Thus, to the extent petitioner suggests that strict forfeiture of defenses not timely raised in the district court is the rule absent an express statutory exception, *Granberry*, *Schiro*, and *Caspari* all refute that suggestion.

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comity and federalism concerns as exhaustion or procedural default." *Id.* at 27. In holding that "it would make scant sense to distinguish * * * AEDPA's time bar from other threshold constraints on federal habeas petitioners," *Day*, 547 U.S. at 209; see *id.* at 205-206, this Court rejected both distinctions. Cf. *id.* at 214 (Scalia, J., dissenting). Moreover, in focusing exclusively on comity and federalism, petitioner ignores the other institutional concerns, such as the finality of criminal judgments, judicial efficiency, and the conservation of scarce judicial resources, on which the limitations defense (and the other defenses) are also grounded.

Nor does Congress's adoption in Section 2254(b)(3) of an explicit rule with respect to waiver of the defense of exhaustion give rise to a negative inference that Congress intended to adopt an absolute and binding rule of timely assertion or forfeiture with respect to other habeas defenses. Rather, the amendment was specifically "designed to disapprove those decisions which have deemed states to have waived the exhaustion requirement, or barred them from relying on it, in circumstances other than where the state has expressly waived the requirement." H.R. Rep. No. 23, 104th Cong., 1st Sess. 10 (1995). Thus, "[h]aving pinpointed that problem, [Congress] gave a pinpoint answer." *United States* v. *Vonn*, 535 U.S. 55, 71 (2002) (Congress's adoption of a harmless-error standard in Fed. R. Crim. P. 11(h) to respond to judicial holdings failing to conduct harmless-error review evinced no intent to displace plain-error review of forfeited claims.). Absent an express statutory provision, the "intermediate approach" set forth in *Granberry*, 481 U.S. at 131, and applied in *Day*, 547 U.S. at 210, should control.

3. Petitioner also relies on *Kontrick* v. *Ryan*, 540 U.S. 443 (2004), and *Eberhart* v. *United States*, 546 U.S. 12 (2005) (per curiam). See Pet. Br. 23-25. Neither case, however, arises in the habeas context and neither directly addresses whether (or when) a federal appellate court retains authority to consider a nonjurisdictional time limit on its own motion.

In *Kontrick*, this Court held that a debtor forfeits Federal Rule of Bankruptcy Procedure 4004(a)'s time limit for a creditor to object to the debtor's discharge by failing to raise it "before the bankruptcy court reaches the merits of the creditor's objection." 540 U.S. at 447. In so holding, the Court determined that Rule 4004(a) is a nonjurisdictional "claim-processing rule" that cannot be raised "after the party has litigated and *lost* the case on the merits." *Id.* at 453-456, 460 (emphasis added). In *Eberhart*, the government appealed the district court's grant of a motion for new trial and raised the timeliness of the defendant's motion under Federal Rule of Criminal Procedure 33(a) for the first time on appeal. 546 U.S. at 13-14. Applying its decision in *Kontrick*, the Court held that Rule 33(b)'s time limits were not jurisdictional and therefore did not "compel" relief in circumstances where (as there) the government had "forfeited that defense." *Id.* at 19.

Both cases establish that certain nonjurisdictional time limits are subject to forfeiture, but that is not in dispute here. The question is whether Section 2244(d)'s statute of limitations defense *may* be raised by a federal appellate court on its own motion, despite the State's forfeiture. Neither case directly addresses whether (or when) a court of appeals might consider a forfeited time limit on its own motion. See *United States* v. *Mitchell*, 518 F.3d 740, 745 (10th Cir. 2008) ("*Kontrick* and *Eberhart* do not specifically speak to the issue of whether a court may *sua sponte* raise timeliness under non-jurisdictional federal rules."). And the issue here is not what a court of appeals should do with a forfeited statute of limitations defense in an ordinary civil or criminal proceeding, but rather what an appellate court may do with *AEDPA*'s limitations defense which, as this Court recognized in *Day*, implicates broader societal interests.[9]

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[9] Notably, in *Kontrick* and *Eberhart*, the losing party sought to *reverse* the district court's judgment by asserting a time bar for the first time after an adjudication of the merits. See *Kontrick*, 540 U.S. at 447, 460; *Eberhart*, 546 U.S. at 14. As noted above (see p. 19, n.7,

4. As petitioner correctly notes, *Day* did rely in part on the district court's authority "to freely allow amendments to pleadings while a matter is still pending." Pet. Br. 32-33. This Court recognized that the district court could have informed the State of its computation error and entertained an amendment to the State's answer under Federal Rule of Civil Procedure 15(a), and saw "no dispositive difference between that route" and the district court raising the issue *sua sponte*. *Day*, 547 U.S. at 209. *Day*, however, did not rest solely on that ground and the decisions on which *Day* relied were not based on Rule 15(a) at all.

As discussed, the Court in *Day* relied on a long line of cases holding that federal courts, including appellate courts, have discretion to consider habeas defenses such as exhaustion, nonretroactivity, and procedural default, despite the State's failure to properly raise those defenses. See 547 U.S. at 206-207. And the Court concluded that "it would make scant sense" to treat AEDPA's time bar differently from those "other threshold constraints on federal habeas petitioners." *Id.* at 209; see *id.* at 205-206. *Granberry*, the "pathmarking" case on which the Court relied (see *Day*, 547 U.S. at 206), certainly did not rest on the *district* court's authority to grant leave to amend; the State raised the issue of exhaustion for the first time on appeal. *Granberry*, 481 U.S. at 130; see *Schiro*, 510 U.S. at 229 (noting that *this Court* "undoubtedly" had the authority to reach a nonretroactivity defense not raised below); pp. 11-13, *supra* (citing court of appeals' case law holding that ap-

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supra), even in ordinary civil litigation, courts have followed a more flexible rule when considering whether to affirm a district court's judgment on grounds other than those raised below.

pellate courts have the authority to reach procedural default for the first time on appeal).[10]

II. THE COURT OF APPEALS DID NOT ABUSE ITS DISCRETION BY REACHING THE TIMELINESS ISSUE IN THIS CASE

That an appellate court *may* consider the timeliness of a habeas petition on its own motion does not mean that it is obliged to do so, or that it retains the discretion to do so in every case. Rather, this Court in *Day* and *Granberry* set forth the proper scope of a federal habeas court's discretionary authority. The court of appeals complied with those directives.

1. As with the exhaustion of state remedies, the cases in which Section 2244(d)'s limitations defense is not properly raised by the State "present a wide variety of circumstances which the courts of appeals * * * are able to evaluate individually." *Granberry*, 481 U.S. at 136. "[B]efore acting on its own initiative," a federal habeas court should (i) "accord the parties fair notice and an opportunity to present their positions," *Day*, 547

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[10] In any event, Federal Rule of Civil Procedure 15(a) could come into play if a case is remanded. If remand is otherwise appropriate, an appellate court could surely identify a potential timeliness issue and suggest that the State seek leave to amend its answer to add a statute of limitations defense on remand. Cf. *Harris* v. *Secretary, U.S. Dep't of Veterans Affairs*, 126 F.3d 339, 345 (D.C. Cir. 1997) (noting that the government could seek leave on remand to amend its responsive pleading to raise the defense of untimeliness). In the many cases where a ruling favorable to the habeas petitioner would result in a remand, permitting the court of appeals to enforce the time bar on its own motion (rather than requiring amendment of the answer on remand) would conserve judicial resources and advance "Congress' intent in AEDPA 'to eliminate delays in the federal habeas review process.'" *Gonzalez*, No. 10-895, slip op. at 9 (quoting *Holland*, 130 S. Ct. at 2562).

U.S. at 210; (ii) "assure itself that the petitioner is not significantly prejudiced by the delayed focus on the limitation issue," *ibid.*; and (iii) "'determine whether the interests of justice would be better served' by addressing the merits or by dismissing the petition as time barred," *ibid.* (citing *Granberry*, 481 U.S. at 136).

Petitioner does not claim that he was prejudiced by the State's failure to challenge the timeliness of his habeas petition in the district court or on its own motion in the court of appeals. And petitioner was given ample opportunity to present his views. Section 2244(d)'s statute of limitations was raised first by the district court and petitioner filed several briefs on that issue, without once mentioning his 1995 postconviction motion. See pp. 3-4, *supra*. Only after the State brought the 1995 motion to the court's attention did the district court dismiss the petition on its merits. *Id.* at 4-5. On appeal, the court raised the limitations defense at the same time it granted petitioner a certificate of appealability and appointed counsel, and petitioner (with the assistance of counsel) filed three additional briefs addressing the time bar. *Id.* at 5-6 & n.1. Although petitioner now contends that the court of appeals lacked any authority to consider the timeliness of his petition, he never made that argument on appeal (and did not argue that the State waived that defense until his petition for panel rehearing). *Id.* at 6 & n.1.

Under those circumstances, the court of appeals correctly concluded that "the interests of justice would be served in reaching the timeliness issue given the extensive time period involved." J.A. 140a n.2 (citing *Day*, 547 U.S. at 210); see *ibid.* (noting that the timeliness issue "was raised in the district court and addressed by [petitioner]" and that "the parties have briefed the issue on appeal").

2. The Court in *Day*, however, also made clear that it would "count it an abuse of discretion [if a court were] to override a State's deliberate waiver of a limitations defense." 547 U.S. at 202. In carving out that exception, the Court focused on whether the State made a "deliberate" and "intelligent" "cho[ice] to waive a statute of limitations defense." *Id.* at 202, 210 n.11. As petitioner acknowledges, to satisfy that standard the State must clearly manifest its intent to "relinquish[] a known right." Pet. Br. 35; see *Kontrick*, 540 U.S. at 458 n.13 (explaining the difference between forfeiture, *i.e.*, "the failure to make the timely assertion of a right" and waiver, *i.e.*, "the 'intentional relinquishment or abandonment of a known right'") (quoting *United States* v. *Olano*, 507 U.S. 725, 733 (1993)).

Because a federal habeas court's authority to raise a limitations defense *sua sponte* is based in large part on institutional interests that extend beyond the interests of the parties before the court, the deliberate-waiver exception recognized in *Day* should be narrowly construed. Only if a State knows it has a meritorious limitations defense and clearly and unambiguously disclaims it should a federal court be deprived of its inherent authority to raise the limitations bar on its own motion.[11]

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[11] A State may determine that the interests of justice are better served by having the federal court consider the merits of a constitutional challenge, rather than assert an otherwise available procedural defense. Cf. Tr. of Oral Arg. at 41-44, *Maples* v. *Thomas*, No. 10-63 (Jan. 18, 2012) (Justices Kennedy and Alito questioning whether the State was precluded from waiving procedural default and consenting to a decision on the merits given the unique facts of the case). Precluding an appellate court from dismissing a petition as untimely when the

3. The case-specific question at issue here is whether the court of appeals "overr[o]de" (*Day*, 547 U.S. at 202) the State's deliberate waiver and thereby abused its discretion in reaching the timeliness issue on its own motion. On balance, and in context, the court of appeals did not abuse its discretion.

The State's declarations in its district court filings were "cryptic." J.A. 140a n.2. In both its pre-answer and answer, the State asserted that it was not "challeng[ing]," but also was not "conceding," the timeliness of petitioner's habeas petition. J.A. 70a; see J.A. 87a. The State made this assertion after first disclosing to the district court the existence of a 1995 motion for state postconviction relief (which petitioner had never mentioned); noting some uncertainty as to how the 1995 motion would affect the timeliness issue; and explaining that if the 1995 motion had been "abandoned," tolling would not be appropriate. J.A. 70a; see J.A. 87a (cross-referencing pre-answer response). Taken together, the State's actions in the district court certainly amounted to a forfeiture, but fell short of a clear and unambiguous waiver.

Significantly, the State clarified any ambiguity on appeal. When the court of appeals requested briefing on the limitations defense, the State did not repeat its prior statements. The State did not decline to challenge the petition's timeliness nor did it affirmatively waive that defense. Instead, the State forcefully argued that the habeas petition was untimely.[12] See Resp. C.A. Supp.

State has made such a deliberate and unambiguous waiver serves that purpose; extending the deliberate-waiver exception to include equivocal statements or mistaken concessions does not.

[12] A closer question might be presented if the State's "cryptic" (J.A. 140a n.2) statements in the district court had been its last word on the

Br. 17-23. And, in response, petitioner did not ask the court of appeals to enforce any purported waiver made in the district court. See Pet. C.A. Supp. Reply Br. 1-8. Indeed, petitioner never mentioned waiver until his petition for panel rehearing, see Pet. for Panel Reh'g 3-9—after the court of appeals *sua sponte* raised and rejected that argument, J.A. 140 n.2.

The relevant question under *Day* is whether the federal habeas court "overr[o]de" (547 U.S. at 202) the State's deliberate and intelligent waiver. At the time the appellate court concluded that the habeas petition was time barred, it clearly did not. Cf. *Collins* v. *Youngblood*, 497 U.S. 37, 41 (1990) (declining to decide *Teague* nonretroactivity issue in light of State's affirmative representation at oral argument, "when asked about the issue," that it "had chosen not to rely on *Teague*"). In those circumstances, and in light of the institutional interests served by allowing an appellate court broad discretion to consider AEDPA's statute of limitations defense *sua sponte*, the court of appeals cannot be said to have overridden a deliberate and intelligent wavier by the State.[13]

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subject. Here, the court of appeals effectively provided the State with an opportunity to clarify its position and only after the State made clear that it was not waiving the limitations defense did the appellate court decide that issue.

[13] Contrary to petitioner's suggestion (Pet. Br. 38-42), there is little reason to think that the State delayed pursuit of a limitations defense to further some strategic advantage. The State was the first to disclose petitioner's 1995 motion for state postconviction relief (his best argument for timely filing). And the State affirmatively argued that the habeas petition was untimely only after it prevailed on the merits and only after the court of appeals requested briefing on that issue. As respondents note, "[i]t would have been a curious strategy indeed to raise the issue in the district court, but not preserve it, in the hope that

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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the Court of Appeals would resurrect the issue on its behalf." Resp. Br. 50.

AMICUS CURIAE BRIEF

[illegible]
AND
BRIEFS

Supreme Court, U.S.
FILED
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No. 10-9995

In the Supreme Court of the United States

PATRICK WOOD, PETITIONER

v.

KEVIN MILYARD, WARDEN,
STERLING CORRECTIONAL FACILITY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR TEXAS, ALABAMA, ARIZONA, FLORIDA, ILLINOIS, KANSAS, MONTANA, NEBRASKA, NEW JERSEY, NORTH DAKOTA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, WASHINGTON, WYOMING, AND GUAM AS AMICI CURIAE SUPPORTING RESPONDENTS

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INTEREST OF AMICI CURIAE

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) imposes a one-year statute of limitations for state prisoners filing federal habeas applications. 28 U.S.C. 2244(d). This enactment accrues to the benefit of amici States by promoting the finality of the judgments of their state courts. See, *e.g.*, *Duncan* v. *Walker*, 533 U.S. 167, 179 (2001). Petitioner asserts that Section 2244(d)'s limitations period "does not raise the same comity and federalism concerns as exhaustion or procedural default," Pet'r Br. 27, but he is mistaken. See *Day* v. *McDonough*, 547 U.S. 198, 209 (2006) ("AEDPA's statute of limitations advances the same concerns as those advanced by the doctrines of exhaustion and procedural default * * * ." (quoting *Long* v. *Wilson*, 393 F.3d 390, 404 (3d Cir. 2004) (Becker, J.))). Because this case presents an important question concerning the implementation of Section 2244(d) by federal courts of appeals, amici States respectfully submit this brief in support of respondents.

SUMMARY OF ARGUMENT

By arguing that Section 2244(d)'s limitations period is subject to ordinary principles of waiver and forfeiture, petitioner takes for granted the applicability of the Federal Rules of Civil Procedure (Civil Rules). Petitioner's assumption is unsound. Civil Rule 8(c)(1) does not govern federal habeas proceedings with respect to waiver or forfeiture of statute-of-limitations defenses, because it is inconsistent in that regard with the Rules Governing Section 2254 Cases in the United States District Courts (Habeas Rules). Habeas Rule 5(b), which establishes a distinct procedural mechanism for pressing Section 2244(d)'s limitations period and other bars to habeas relief, does not incorporate waiver or forfeiture principles. And Habeas Rule 4 departs from the purely adversarial litigation model that petitioner attributes to the Civil Rules, in favor of a more inquisitorial model that gives district courts an independent duty to weed out losing habeas applications. The Court did not have to address this issue of inconsistency in *Day* v. *McDonough*, 547 U.S. 198 (2006). The issue is squarely presented here, however, and the Court should now hold that waiver and forfeiture principles derived from Civil Rule 8(c)(1) do not deprive the courts of appeals of authority to raise Section 2244(d)'s limitations period *sua sponte*.

ARGUMENT

WAIVER AND FORFEITURE PRINCIPLES FROM THE CIVIL RULES DO NOT PREVENT APPELLATE COURTS FROM RAISING AEDPA'S LIMITATIONS PERIOD *SUA SPONTE*, BECAUSE THOSE PRINCIPLES ARE INCONSISTENT WITH THE HABEAS RULES

A. As framed by the Court, the first question presented asks, "Does an appellate court have the authority to raise *sua sponte* a 28 U.S.C. § 2244(d) statute of limitations defense?" *Wood* v. *Milyard*, 132 S. Ct. 70 (2011). Petitioner takes this question to implicate principles of waiver and forfeiture, arguing that "[t]he one-year federal limitations period in 28 U.S.C. § 2244(d) for filing habeas petitions is an affirmative defense, subject to waiver or forfeiture." Pet'r Br. 17. Evaluating the soundness of his claim requires an understanding of the legal basis for waiver and forfeiture principles.

Waiver and forfeiture "are not really the same," though the concepts are related insofar as waiver is "one means by which a forfeiture may occur." *Freytag* v. *Comm'r*, 501 U.S. 868, 894 n.2 (1991) (Scalia, J., concurring in part and concurring in the judgment). "Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." *United States* v. *Olano*, 507 U.S. 725, 733 (1993) (internal quotation marks omitted). Waiver, then, is a subset of forfeiture—it is forfeiture effected by an act (intentional abandonment) rather than just an omission (failure to assert). See *Town of Concord* v. *FERC*, 955 F.2d 67, 72 (D.C. Cir. 1992) (Randolph, J.) ("To use Justice Scalia's terminology, waiver means that a right has been 'forfeited' by intentional abandonment.").

In ordinary civil litigation, a statute of limitations provides an affirmative defense that can be waived or forfeited. See, *e.g.*, *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 133 (2008). Civil Rule 8(c)(1) makes it so. See Fed. R. Civ. P. 8(c)(1) ("In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including * * * statute of limitations * * * ."); see also Fed. R. Civ. P. 12(b). Civil Rule 8(c)(1) directs parties to "affirmatively state" a statute-of-limitations defense, and defiance of this command has been held to result in waiver or forfeiture. See *Day* v. *McDonough*, 547 U.S. 198, 207-208 (2006) ("Under the Civil Procedure Rules, a defendant forfeits a statute of limitations defense, see Fed. Rule Civ. Proc. 8(c), not asserted in its answer, see Rule 12(b), or an amendment thereto, see Rule 15(a)."); *id.* at 212 (Scalia, J., dissenting) ("[T]he Civil Rules adopt the traditional forfeiture rule for unpleaded limitations defenses.").[1]

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[1] As the leading treatise explains:

> It is a frequently stated proposition of virtually universal acceptance by the federal courts that a failure to plead an affirmative defense as required by [Civil] Rule 8(c) results in the waiver [read: forfeiture] of that defense and its exclusion from the case * * * . This proposition has been announced by numerous federal courts in cases involving a variety of affirmative defenses, including * * * the bar of the applicable statute of limitations * * * .

5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1278, at 644-660 (3d ed. 2004).

The notion that Section 2244(d)'s limitations period is subject to waiver or forfeiture assumes that federal habeas proceedings are governed in this respect by Civil Rule 8(c)(1). See *Day*, 547 U.S. at 219 (Scalia, J., dissenting) ("I would hold that the ordinary forfeiture rule, *as codified in the Civil Rules*, applies to the limitations period of §2244(d)." (emphasis added)). Indeed, petitioner explicitly invokes Civil Rule 8(c) in arguing that respondents waived or forfeited any Section 2244(d) defense through their acts or omissions in the district court. Pet'r Br. 22, 25-26.

Petitioner's argument demands harmony between the Civil Rules and the Habeas Rules on the subject of waiver and forfeiture. Any inconsistency would defeat the assumption upon which his argument is based, because the Civil Rules "may be applied" to federal habeas proceedings only "to the extent that they are not inconsistent with" the Habeas Rules themselves. Rule 11, Rules Governing Section 2254 Cases in the United States District Courts, reprinted in 28 U.S.C. 2254 (2006); see also Rule 1(a), Rules Governing Section 2254 Cases in the United States District Courts, reprinted in 28 U.S.C. 2254 (2006) (defining the scope of the Habeas Rules); Fed. R. Civ. P. 81(a)(4) (limiting the scope of the Civil Rules in habeas proceedings); *Woodford* v. *Garceau*, 538 U.S. 202, 208 (2003) ("The Federal Rules of Civil Procedure apply in the context of habeas suits to the extent that they are not inconsistent with the Habeas Corpus Rules."); Habeas Rule 11, Advisory Committee Note, 28 U.S.C. 2254 (2006) ("The court does not have to rigidly apply [Civil Rules] which would be inconsistent or inequitable in the overall framework of habeas corpus."). If the waiver and forfeiture principles derived from Civil Rule 8(c)(1) are inconsistent with the Habeas Rules, then the Civil Rules cannot forbid appellate courts to raise Section 2244(d)'s limitations period *sua sponte*.

B. The Civil Rules and the Habeas Rules are inconsistent with respect to waiver or forfeiture of statute-of-limitations defenses. Petitioner's attempt to subject Section 2244(d)'s limitations period to Civil Rule 8(c)(1) fails as a result of this inconsistency.

1. The fatal inconsistency is best illustrated by Habeas Rule 5(b), which prescribes the contents of the government's answer in a habeas proceeding. If the district court calls for a response to a federal habeas application under Habeas Rule 4, then Habeas Rule 5(b) goes on to provide:

> The answer must address the allegations in the petition. In addition, it must state whether any claim in the petition is barred by a failure to exhaust state remedies, a procedural bar, non-retroactivity, or a statute of limitations.

Significantly, for purposes of this case, "the statute of limitations is explicitly aligned with" defenses based on exhaustion, procedural default, and non-retroactivity. *Day*, 547 U.S. at 208; see also *id.* at 209 (noting that Habeas Rule 5(b) "plac[es] 'a statute of limitations' defense on a par with 'failure to exhaust state remedies, a procedural bar, [and] non-retroactivity' " (second alteration in original)).

Habeas Rule 5(b) sets up a distinct procedural mechanism for urging these impediments to federal habeas relief, quite apart from the general regime of the Civil Rules. Given that Habeas Rule 5(b) compels the government to "state whether any claim in the petition is barred by a failure to exhaust state remedies, a procedural bar, non-retroactivity, or a statute of limitations," there is no need to apply Civil Rule 8(c)(1)'s requirement that a party "affirmatively state" things like statute-of-limitations defenses. And given that Habeas Rules 5(b) and 4 provide for responsive filings in the form of an "answer" or a "motion," there is little work left for Civil Rule 12(b) to do. Because Habeas Rule 5(b) establishes an independent procedural mechanism tailored to the peculiarities of habeas practice, application of Civil Rule 8(c)(1) in that context will be redundant at best and inconsistent at worst.

Examination of Habeas Rule 5(b)'s mechanism reveals that it does not entail ordinary principles of waiver or forfeiture—notwithstanding its command that the government "must state whether any claim in the petition is barred by a failure to exhaust state remedies, a procedural bar, non-retroactivity, or a statute of limitations." In *Granberry* v. *Greer*, 481 U.S. 129, 131-134 (1987), the Court held that a court of appeals may consider an exhaustion argument that was not urged in district court. The circuits, meanwhile, "have unanimously held that, in appropriate circumstances, courts, on their own initiative, may raise a petitioner's procedural default." *Day*, 547 U.S. at 206-207 (collecting cases and noting that the issue was left open in *Trest* v. *Cain*, 522 U.S. 87, 90 (1997)). Similarly, *Caspari* v. *Bohlen*, 510 U.S. 383, 389 (1994), and *Schiro* v. *Farley*, 510 U.S. 222, 229 (1994), recognize that federal courts have discretion to consider nonretroactivity *sua sponte*. And in *Day*, 547 U.S. at 209, the Court held "that district courts are permitted, but not obliged, to consider, *sua sponte*, the timeliness of a state prisoner's habeas petition," while "noting that it would make scant sense to distinguish in this regard AEDPA's time bar from other threshold constraints on federal habeas petitioners" enumerated in Habeas Rule 5(b).

Habeas Rule 5(b), as it has been interpreted by the Court, does not impose the same waiver and forfeiture principles that have been judicially attributed to Civil Rule 8(c)(1). Accordingly, petitioner's reliance on Civil Rule 8(c)(1), Pet'r Br. 22, 25-26, is an invitation to inconsistency.

2. Habeas Rule 4 deepens the inconsistency by establishing that federal habeas practice does not follow the party-driven model of litigation that petitioner attributes to the Civil Rules. District courts are duty-bound "to play a more active role in § 2254 cases than they generally play in many other kinds of cases." *Hardiman* v. *Reynolds*, 971 F.2d 500, 504 (10th Cir. 1992). This is due to Habeas Rule 4, which provides in pertinent part:

> The clerk must promptly forward the petition to a judge under the court's assignment procedure, and the judge must promptly examine it. If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner. If the petition is not dismissed, the judge must order the respondent to file an answer, motion, or

> other response within a fixed time, or to take other action the judge may order.

See also 28 U.S.C. 2243 (relieving district court of obligation to take further action on an application for federal habeas relief if "it appears from the application that the applicant or person detained is not entitled thereto").

Under the Habeas Rules, therefore, "it is the duty of the court to screen out frivolous applications and eliminate the burden that would be placed on the respondent by ordering an unnecessary answer." Habeas Rule 4, Advisory Committee Note, 28 U.S.C. 2254 (2006). Assignment of this gatekeeping role to the federal courts reflects "the profound societal costs that attend the exercise of habeas jurisdiction." *Calderon* v. *Thompson*, 523 U.S. 538, 554 (1998) (quoting *Smith* v. *Murray*, 477 U.S. 527, 539 (1986)). Habeas Rule 4 confirms that "values beyond the concerns of the parties" are often in play in habeas litigation, *Day*, 547 U.S. at 205 (quoting *Acosta* v. *Artuz*, 221 F.3d 117, 123 (2d Cir. 2000)), by taking the decision to waive out of the government's hands altogether—after all, a party cannot express intentional abandonment of a defense if the district court ends the case without even entertaining that party's views.

By directing district courts "to weed out meritless habeas petitions" without so much as a response from the government, Habeas Rule 4 "differentiates habeas cases from other civil cases with respect to *sua sponte* consideration of affirmative defenses." *Kiser* v. *Johnson*, 163 F.3d 326, 328 (5th Cir. 1999). Petitioner acknowledges that his attempt to import waiver and forfeiture principles from Civil Rule

8(c)(1) is calculated to "advance[] the adversary and party presentation principles underlying the American judicial system, by requiring issues to be presented by the parties to the court." Pet'r Br. 27. But the purely adversarial model that petitioner advocates is fundamentally inconsistent with practice under Habeas Rule 4, which has been made partially inquisitorial by design. Cf. *United States* v. *Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring) ("The rule that points not argued will not be considered * * * distinguishes our adversarial system of justice from the inquisitorial one.").

C. In *Day*, the Court resolved an issue closely related to the first question presented in this case, holding that district courts have authority to raise Section 2244(d)'s limitations period *sua sponte*. *Day*, 547 U.S. at 209. In reaching this sound result, however, the *Day* Court did not squarely address the matter of inconsistency between the Habeas Rules and the Civil Rules regarding waiver or forfeiture of statute-of-limitations defenses. See *id.* at 212 (Scalia, J., dissenting) (asserting that "[t]he Court does not identify any 'inconsisten[cy]' between this forfeiture rule and the statute, Rules, or historical practice of habeas proceedings" (second alteration in original)).

Day did not address this inconsistency because Civil Rule 15(a) offered a procedural crutch that supported its holding: Instead of raising a Section 2244(d) problem *sua sponte*, a district court could direct the government to amend its answer, pursuant to Civil Rule 15(a), and include a Section 2244(d) argument. See *Day*, 547 U.S. at 209 (majority opinion). Having thus found a way to reconcile the

Civil Rules with the aversion to waiver and forfeiture reflected in federal habeas practice, the *Day* Court did not have to decide whether any inconsistency foreclosed application of Civil Rule 8(c)(1).

As petitioner points out, see Pet'r Br. 33, the procedural crutch of Civil Rule 15(a) probably cannot support a holding in favor of *sua sponte* consideration by a court of appeals. But there is no need to give the government the benefit of phantom amendments under Civil Rule 15(a) if the waiver and forfeiture principles derived from Civil Rule 8(c)(1) do not apply in the first place. The first question presented in this case calls for a decision as to whether Civil Rule 8(c)(1) and the Habeas Rules are inconsistent with respect to waiver and forfeiture of statute-of-limitations defenses. Because such an inconsistency exists, the Court should hold that waiver and forfeiture principles derived from Civil Rule 8(c)(1) do not justify reversal of the judgment below.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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